Dec 12 1864
Submitted [illegible]
Aff'd

Mr Justice Clifford

SUPREME COURT OF THE UNITED STATES.

No. ~~216.~~ 101.

GOING HATHORN, PLAINTIFF IN ERROR,

VS.

JOSIAH CALEF.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MAINE.

GOVERNMENT PRINTING OFFICE.

postponed

[illegible]

Reversed

Mr Jus Nelson

SUPREME COURT OF THE UNITED STATES.

No. 216.

GOING HATHORN, PLAINTIFF IN ERROR,

vs.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF MAINE.

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1 UNITED STATES OF AMERICA,
Maine District, First Circuit, ss:

The President of the United States of America to the honorable the judges of the supreme court of the State of Maine, greeting:

[SEAL.] Because in the record and proceedings, as also in the rendition of judgment, on or about July 28, A. D. 1862, in a suit before you, or some of you, being the highest court of law in said State, between Going Hathorn, of Pittsfield, in the county of Somerset and State of Maine, a citizen of said State, plaintiff, and Josiah Calef, of Saco, in the county of York, in said State, and a citizen of said State, defendant, in a plea of the case, wherein was drawn in question the validity of a statute of said State, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of such its validity, a manifest error hath happened to the great damage of the said Going Hathorn, as by his complaint appears:

We, willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings in the suit aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same before the chief justice and the associate justices of the said Supreme Court of the United States on the first Monday of December next, at Washington, in the District of Columbia, being the present seat of the national government, at the term of said court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court of the United States, at Washington aforesaid, this twenty-eighth day of July, in the year of our Lord one thousand eight hundred and sixty-two.

GEO. F. EMERY,
Clerk of the Circuit Court of the United States,
First Circuit, Maine District.

Allowed.

NATHAN CLIFFORD,
Associate Justice of the Supreme Court of the U. S. A.

[Indorsement.]

Writ of error.

Supreme Court of the United States, 1st Monday of December, 1862.

GOING HATHORN
v.
JOSIAH CALEF.

Sup. judicial court of the State of Maine, county of Somerset.

AUGUST 5, 1862.

Received and filed in the office of the clerk of said court.
JAS. W. MERRILL, *Clerk.*

Office of David D. Stewart, (1566,) St. Alban's Maine.

Citation.

2 UNITED STATES OF AMERICA,
Maine District, ss:

To Josiah Calef, of Saco, in the county of York, in the State and district of Maine, greeting:

You are hereby cited and admonished to be and appear before the chief justice and associate justices of the Supreme Court of the United States on the first Monday of December next, (A. D. 1862,) at Washington, the present seat of the national government, then and there to answer to a writ of error this day sued of the clerk's office of the circuit court of the United States for the first circuit and district aforesaid, wherein Going Hathorn, of Pittsfield, in the county of Somerset and State of Maine, is plaintiff in error, against you, as defendant, to show cause, if any there be, why the judgment rendered on or about July 28, 1862, by the supreme court of the State of Maine, sitting within and for the county of Somerset, in said writ of error mentioned, should not be corrected, and speedy justice done to the parties in that behalf.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court of the United States, at Washington aforesaid, this twenty-eighth day of July, in the year of our Lord one thousand eight hundred and sixty-two.

NATHAN CLIFFORD,
Associate Justice of the Supreme Court U. S.

UNITED STATES OF AMERICA,
District of Maine, ss:

OCTOBER 24, *A. D.* 1862.

I have this day served the foregoing citation upon the within named Josiah Calef, by delivering to him, in hand, a true and attested copy of the same.

F. A. QUINBY,
U. S. Deputy Marshal, Dist. of Maine.

Fees :	Service	$2 00
	Trav. 17 m's	1 02
	Copy	50
		$3 52

Copy of bond.

3 Know all men by these presents that we, Going Hathorn, of Pittsfield, in the county of Somerset and State of Maine, as principal, and Greenwood Runnels and Lewis Wyman, in town, county, and State aforesaid, as sureties, are holden and stand firmly bound and obliged unto Josiah Calef, of Saco, in the county of York, in said State, in the full and just sum of five hundred dollars, to be paid unto the said Caleff, his executors, administrators, or assigns ; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals ; dated the 28th day of July, in the year of our Lord one thousand eight hundred and sixty-two.

The condition of this obligation is such, that whereas the said Going Hathorn hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in a certain suit, in a plea of the case, in which suit the said Going Hathorn was the original plaintiff, and the said Josiah Calef was the orignal defendant, which judgment was rendered in the supreme judicial court of the said State of Maine, sitting within and for the county of Somerset, on or about the 28th day of July, A. D. eighteen hundred and sixty-two : Now, therefore, the condition of this obligation is such, that if the above named Going Hathorn shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void ; otherwise, the same shall be and remain in full force and virtue.

GOING HATHORN. [SEAL.]
GREENWOOD RUNNELS. [SEAL.]
LEWIS WYMAN. [SEAL.]

Signed, sealed, and delivered in presence of—
OBED FOSS.

I am personally acquainted with the principal and sureties in the above bond, and they are perfectly responsible.

J. C. CONNOR,
Postmaster of Pittsfield.

JULY 28, 1862.

The above bond is perfectly good ; obligors are worth $25,000.

D. D. STEWART.

Approved.

NATHAN CLIFFORD,
Associate Justice of the Supreme Court of the United States.

Supreme judicial court, county of Somerset, August 5, 1862.—Received and filed in the office of the clerk of said court.

JAS. W. MERRILL, *Clerk.*

A true copy of bond and the filing thereon. Attest:

S. D. LINDSEY, *Clerk.*

4 STATE OF MAINE,
Somerset, ss:

At the supreme judicial court begun and holden at Norridgewock, within and for the county of Somerset, on the third Tuesday of March, being the eighteenth day of said month, in the year of our Lord one thousand eight hundred and sixty-two.

Present: Hon. John S. Tenney, chief justice of said court.

GOING HATHORN, of Pittsfield, in said county of Somerset, esquire, plaintiff,
vs.
JOSIAH CALEFF, of Saco, in York county, defendant.
No. 61.

In a plea of the case, for that the plaintiff, by the consideration of our justices of our supreme judicial court, begun and holden at Norridgewock, in and for the county of Somerset, on the third Tuesday of December, A. D. 1857, recovered two judgments against the Kennebec and Portland Railroad Company, a corporation duly incorporated and organized under the laws of this State, and having a place of and doing business at Augusta, in the county of Kennebec; the first of the aforesaid judgments being for the sum of $1,471 16 debt, and $19 78 costs of suit, and was recovered in a suit commenced against
said Kennebec and Portland Railroad Company on Februa-
5 ry 14, 1856; and the other judgment being for $1,146 56
debt, and $19 70 costs of suit, and was recovered in a suit
commenced against said Kennebec and Portland Railroad Company, on January 19, 1856, as by the record of said judgments appear, said judgments having been recovered on debts legally contracted by said company on August 1 and Oct. 20, 1855, for railroad sleepers sold and delivered by the plaintiff to said company on those days, at their instance and request, for the repair of said railroad between Portland and Augusta, and which were used for that purpose; said debts and the judgments thereon aforesaid still remaining unpaid and due to the plaintiff. And afterwards, on March 17, 1858, the plaintiff sued out of the clerk's office of said court executions upon said judgments in due form of law, against said company, and on the same day placed the same for service in the hands of Jabez S. Currier, then and ever since a deputy sheriff in and for said county of Kennebec, duly authorized and legally qualified to serve, execute, and return said executions; and who afterwards, to wit, on March 24, 1858, did return the same into our said clerk's office wholly unsatisfied, for want

of attachable corporate property of said company wherewith to satisfy them, as by said executions and the officer's returns of service thereon appears. And the plaintiff afterwards, on March 24th, 1858, aforesaid, placed the same executions, then and still unsatisfied, in the hands of Phineas Libbey, 2d, then and ever since a deputy sheriff 6 in and for the county of York, where said defendant lives, for service, he, the said Libbey, being then and there and ever since duly authorized and legally qualified to serve, execute, and return the same, and who afterwards, to wit, on the same day, returned the same into our said clerk's office wholly unsatisfied, for want of attachable property of said company wherewith to satisfy them, as by said executions and said officer's returns of service thereon appears. And afterwards, to wit, on the same day, the plaintiff again placed said executions in said Libbey's hands, as an officer aforesaid, and in his presence demanded of the defendant to disclose and show to said Libbey, he then and there having said executions in his hands, as an officer, ready for service, attachable property of said corporation sufficient to satisfy said executions, which he, the said defendant, then and there declined and refused to do. And said Libbey did also then and there, in behalf of said plaintiff, and in his presence, make the same demand on said defendant, he, the said Libbey, then and there having said executions in his hands, as an officer, ready for service, and said defendant declined and refused to disclose or show to said officer any attachable property of said corporation wherewith to satisfy said executions, as by said executions and the officer's returns of service thereon appears. And the plaintiff avers that long before and at the time his debts aforesaid were contracted by said corporation, said defendant was a stockholder in the same, 7 and the owner of stock therein to the amount of twenty-five hundred dollars, and has continued to be such owner and stockholder to the present time, with no debts or claims due him from said corporation which could be used by him in set off, or by way of defence to the plaintiff's claim. By virtue of all which the said defendant has become liable to the plaintiff to pay him the sum of $2,500 00, being the amount of his stock in said company, and in consideration thereof promised to pay the plaintiff that sum on demand; yet the said defendant, although often requested, the same has not paid, but refuses, to the damage of the said plaintiff (as he says) the sum of twenty-eight hundred dollars.

This action was commenced and entered at the September term of this court in this county, A. D. 1858, and was thence continued from term to term until the December term of this court, in this county, when the said defendant comes and defends, &c., when, &c., and for plea says that he never promised in manner and form as the plaintiff has alleged, and thereof puts himself on the country, by his att'y, John S. Abbott; and the plaintiff likewise, by D. D. Stewart, his att'y. And for brief statement in this behalf, the defendant says that he has not been the owner of any stock, nor the holder of any, in said Kennebec Railroad Company within one year and six months prior to the commencement of the above term, and he will

8 also rely upon the points stated in his specifications of defence.

Issue being thus joined, the cause, after a full hearing, was committed to a jury sworn according to law to try the issue, who, under the instructions of the court, returned a verdict therein in the words and figures following:

STATE OF MAINE,
Somerset, ss:

Sup. jud. court, Dec. term, 1859.

GOING HATHORN
vs.
JOSIAH CALEFF.

The jury find that the said defendant did not promise the plaintiff in manner and form as the said plaintiff has in his writ and declaration alleged against him.

ARTHUR DINSMORE, *Foreman.*

At the request of the parties, and of the court, the jury returned the following special facts as found by them, and as making a part of their verdict, in answer to questions propounded by the court.

1. When was the Kennebec and Portland Railroad Company organized under their charter?

Answer by jury. On Oct. 28, 1846.

2. Have said company exercised the rights and privileges of such incorporation and organization since that time to the present?

Answer. They have.

3. What was the nature and consideration of the debt contracted by said corporation with the plaintiff?

Answer. Railroad sleepers furnished by the plaintiff to re-
9 pair the railroad between Augusta and Portland.

4. When was such debt contracted?

Answer. On August 1 and Oct. 20, 1855.

5. Was the defendant then a stockholder and owner of shares in said corporation?

Answer. He was.

6. How many shares did he then own, and what was their value?

Answer. Twenty-five shares of one hundred dollars each.

7. Did he continue to own said stock until after the recovery of the judgment described in the plaintiff's writ.

Answer. He did.

8. Are all the proceedings in this suit of the plaintiff against the defendant as a stockholder made in accordance with the laws of this State and the provisions of the charter of the Kennebec and Portland Railroad Company?

Answer. They are.

9. Is your verdict for the defendant wholly grounded upon the instructions of the court, that by a law of this State, passed April 9, 1856, (being chap. 271 of laws of 1856,) the plaintiff's right to recover in this action was taken away?

Answer. It is so grounded.

10. At the time when the plaintiff's debt aforesaid was con-
10 tracted, was said Kennebec and Portland Railroad Company
in an embarrassed and insolvent condition?

Answer. Yes.

Request by defendant. 1. When did the defendant cease to be an owner or holder of stock in said Kennebec and Portland Railroad Company?

Answer. On February 26, 1858.

2. Did this fact appear in plaintiff's proof?

Answer. Yes.

Request by plaintiff. Has the defendant offered any proof that any transfer of his stock has ever been entered on the records of the corporation?

Answer. No.

ARTHUR DINSMORE, *Foreman.*

But the plaintiff having excepted to the ruling and instructions of the court as to questions of law, and having reduced his exceptions to writing in the words and figures following, to wit:

This is an action of assumpsit against the defendant as a stockholder in the Kennebec and Portland Railroad Company. Writ is dated March 26, 1858, and returnable to the then next term of this court, to be held on the third Tuesday of September, 1858, and was duly
served on the defendant, who lives in Saco, in the county of
11 York, in this State, returned and entered at that term. The
declaration is as follows:

In a plea of the case, for that the plaintiff, by the consideration of our justices of our supreme judicial court, begun and holden at Norridgewock, in and for the county of Somerset, on the third Tuesday of December, A. D. 1857, recovered two judgments against the Kennebec and Portland Railroad Company, a corporation duly incorporated and organized under the laws of this State, and having a place of and doing business at Augusta, in the county of Kennebec; the first of the aforesaid judgments being for the sum of $1,471 16 debt, and $19 78 costs of suit, and was recovered in a suit commenced against said Kennebec and Portland Railroad Company on February 14, 1856; and the other judgment being for $1,146 56 debt, and $19 70 costs of suit, and was recovered in a suit commenced against said Kennebec and Portland Railroad Company on January 19, 1856, as by the record of said judgments appears; said judgments having been recovered on debts legally contracted by said company on August 1 and October 20, 1855, for railroad sleepers sold and delivered by the plaintiff to said company on those days, at their instance and request, for the repair of said railroad between Portland and Augusta, and which were used for that purpose; said debts and the judgments thereon aforesaid still remaining unpaid and due to the plaintiff. And afterwards, on March 17, 1858, the plain-
tiff sued out of the clerk's office of said court executions upon
12 said judgments in due form of law, against said company, and

on the same day placed the same for service in the hands of Jabez S. Currier, then and ever since a deputy sheriff in and for said county of Kennebec, duly authorized and legally qualified to serve, execute and return said executions; and who afterwards, to wit, on March 24, 1858, did return the same into our said clerk's office wholly unsatisfied, for want of attachable corporate property of said company wherewith to satisfy them, as by said executions and the officer's returns of service thereon appears. And the plaintiff afterwards, on March 24, 1858, aforesaid, placed the same executions, then and still unsatisfied, in the hands of Phineas Libbey, 2d, then and ever since a deputy sheriff in and for the county of York, where said defendant lives, for service, he, the said Libbey, being then and there and ever since duly authorized and legally qualified to serve, execute, and return the same, and who afterwards, to wit, on the same day, returned the same into our said clerk's office wholly unsatisfied, for want of attachable property of said company wherewith to satisfy them, as by said executions and said officer's returns of service thereon appears. And afterwards, to wit, on the same day, the plaintiff again placed said executions in said Libbey's hands, as an officer aforesaid, and in his presence demanded of the defendant to disclose and show to said Libbey, he then and there having said executions in his hands, as an officer ready for service, attachable
property of said corporation sufficient to satisfy said execu-
13 tion, which he, the said defendant, then and there declined
and refused to do. And said Libbey did also, then and there, in behalf of said plaintiff, and in his presence, make the same demand on said defendant, he, the said Libbey, then and there having said executions in his hands, as an officer, ready for service, and said defendant declined and refused to disclose or show to said officer any attachable property of said corporation wherewith to satisfy said executions, as by said executions and the officer's returns of service thereon appears. And the plaintiff avers that long before, and at the time his debts aforesaid were contracted by said corporation, said defendant was a stockholder in the same and the owner of stock therein to the amount of twenty-five hundred dollars, and has continued to be such owner and stockholder to the present time, with no debts or claims due him from said corporation which could be used by him in set off, or by way of defense to the plaintiff's claims. By virtue of all which the said defendant has become liable to the plaintiff to pay him the sum of $2,500 00, being the amount of his stock in said company, and in consideration thereof promised to pay the plaintiff that sum on demand.

This action came on for trial at the present term of this court, December, 1859. The defendant pleaded non-assumpsit, upon which issue was joined, and by brief statement alleged that he had not been the owner of any stock, nor the holder of any in said rail-
road company within one year and six months prior to the
14 commencement of this term, and that he should also rely upon
the grounds stated in his specifications of defense.

The specifications of defense were as follows :

1st. Defendant alleges that no such judgments were recovered against the Kennebec and Portland Railroad Company as described in the writ.

2d. He denies that at the time of the recovery of the alleged judgments, or before or since, there was any such corporation as the Kennebec and Portland Railroad Company.

3d. He denies that any such debts were contracted by said company as are set forth in the writ; and he denies that said company is or was indebted to the plaintiff.

4th. He denies that any executions were delivered to any deputy sheriff, and that any such demand was made by virtue of them as set forth in the writ.

5th. He denies that he was a stockholder in said company as set forth in the writ, and denies that he has been a stockholder in said company for the last two years.

6th. He alleges that he has debts or claims against said corporation larger than the plaintiff's claim.

7th. He denies that he is legally liable in this action upon the facts and allegations set forth in the writ, even if they were all true. And said defendant believes that there is a good defense to all or a part of said plaintiff's claim, and he intends in good faith to make such defense.

JOHN S. ABBOTT,
Def't's Attorney.

The plaintiff introduced and read the charter of the Ken-
15 nebec and Portland Railroad Company, granted by the legis-
lature of the State of Maine April 1, 1836, which is as follows,
viz:

AN ACT to incorporate the Kennebec and Portland Railroad Company. Approved April 1, 1836.

SECT. 1. *Be it enacted by the senate and house of representatives in legislature assembled*, That Robert Hallowell Gardiner, O. B. Dorrance, F. Allen, M. Greenwood, A. Berry, N. F. Deering, P. Sheldon, M. P. Sawyer, Henry Bowman, Wm. Stevens, 2d, J. P. Boyd, F. Tinkham, John Henry, E. Swan, John Otis, Ruel Williams, A. Reddington, E. F. Deane, G. Evans, H. B. Hoskins, A. J. Stone, R. K. Page, S. H. Mudge, A. Shaw, S. E. Crocker, E. McLellan, Francis Richards, M. Springer, Wm. Palmer, Allen Lumbard, R. H. Gardiner, jr., E. C. Stevens, James L. Child, T. W. Smith, S. Kingsbury, A. S. Chadwick, R. Boyd, M. French, Nath'l Kimball, Hiram Stevens, Alex. Cooper, Martin Gore, Stephen Young, H. Goddard, D. Scribner, J. C. Humphrey, D. Dunlap, David Weal, Josiah Merrow, their associates, successors, and assigns, be, and they hereby are, made a body politic and corporate by the name of the Kennebec and Portland Railroad Company, and by that name shall have and
enjoy all the rights, privileges, and immunities incident to cor-
16 porations, and subject to the liabilities and duties provided for
by an "act concerning corporations," passed February six-

teenth, one thousand eight hundred and thirty-six, so far as the same is made applicable to railroads heretofore incorporated, and also subject to the duties and liabilities, and entitled to all the rights, privileges, and immunities provided for in the "act defining the rights and duties of railroad corporations," passed March first, one thousand eight hundred and thirty-six ; and also shall have the power to ordain and establish such by-laws as shall from time to time be deemed necessary and proper for the management and regulation of their affairs, not repugnant to the laws of this State ; and said company are hereby authorized and empowered to locate, construct, and maintain a railroad, commencing at a point in the city of Portland, and thence passing through the towns of North Yarmouth, Freeport, Brunswick Village, and Topsham, to Gardiner Village; and thence to Hallowell Village; and thence to Augusta Village, on the west side of Kennebec river.

SECT. 2. *Be it further enacted*, That the powers of said company, except at the legal meetings thereof, shall be vested in a board of not less than nine directors, who shall be chosen at the first meeting of said company, and afterwards annually at such time as the by-
laws of the company shall prescribe, and shall hold their
17 offices for one year, and until others shall be chosen in their
stead; and said directors shall annually elect from their own
body a president, secretary, treasurer, and such other officers as said by-laws shall direct, and shall have power to employ and invest the proceeds of the railroad as they may see fit, for the use and benefit of the stockholders.

SECT. 3. *Be it further enacted*, That this grant shall be void unless the route of said railroad shall be surveyed and a return of said survey be made to the county commissioners of the counties through which said railroad shall pass, and to the governor and council, on or before the first day of August, one thousand eight hundred and thirty-seven, and the stock taken up within two years thereafter, and at least that part of said route between Portland and Brunswick be completed and in operation within six years from the said first day of August, one thousand eight hundred and thirty-seven, and the whole route within ten years therefrom.

SECT. 4. *Be it further enacted*, That the capital stock of said company may consist of one million two hundred thousand dollars, and shall be divided into shares of two hundred dollars, and each share shall be entitled to one vote by the person holding such share, or
shares, or by authorizing some person in writing to vote and
18 act as his proxy, but no member shall be allowed more than
fifty votes.

SECT. 5. *Be it further enacted*, That said company may from time to time establish, demand, and collect such tolls for the transportation of persons, goods, wares, merchandise, or commodity whatever, on said railroad, as they may see fit : *Provided*, That whenever the profits arising from tolls or otherwise shall exceed twelve per centum per annum on the actual cost of said railroad, after deducting all necessary disbursements in conducting its operations, then the leg-

islature shall from time to time have the right so to reduce such tolls as may have been established, not below the rate of twelve per centum per annum, as aforesaid, as may be judged expedient; and to carry this provision into effect, it shall be the duty of said company, within one year after said railroad shall have been in operation, or any part thereof, to make return to the governor and council of the actual cost of said railroad, or part thereof, and annually thereafter, of all disbursements made and allowed by the directors, and the rates of toll by them established, the amount of tolls and other profits received, and the rate of profits or per centum on the cost aforesaid actually realized within the year; and if the legislature shall not be satisfied with such return, the legislature may require an examination into the affairs of said company in such manner as they
shall direct. And if it shall appear that the affairs of said
19 company have not been economically conducted, and that the
profits arising from tolls or otherwise might have exceeded
might have exceeded the maximum of twelve per centum per annum, or that any wilful evasion of the provisions of this section shall have been practised by said company, then the legislature shall have the right to make such reasonable reduction of the charges for disbursements as aforesaid allowed and charged by said directors as shall be judged economical, and from such basis so to reduce the tolls and profits, not, however, below the rate of twelve per centum per annum as aforesaid, as shall be judged expedient, anything in this act to the contrary notwithstanding: *And provided, further*, That the legislature shall not so reduce said tolls and profits below the rates, nor on any principle more unfavorable to said company, than the mode adopted in the charter of Maine, New Hampshire, and Massachusetts Railroad Corporation, and making the same reservation in aid of primary schools in this charter as is reserved in that.

SECT. 6. *Be it further enacted*, That it shall be the duty of said company to provide and maintain on their railroad suitable and convenient cars for the transportation of persons and freight of every description to be transported thereon, and may purchase, take, and
hold such land and other property, may establish such depots,
20 warehouses, and other works, as may be necessary for the
safekeeping and accommodation of persons, goods, wares, and merchandise transported or to be transported thereon, as may be found expedient for the construction and use of said railroad and other works, and shall have a lien for tolls due on all property of every description by them transported from place to place, with the right to sell so much thereof as may be necessary to pay the same with incidental charges, and may make and collect such assessments on the shares of said capital stock as may be deemed expedient, in such manner as shall be prescribed in their by-laws.

SECT. 7. *Be it further enacted*, That it shall be the duty of said company to receive from any other railroad established by authority of this State, connected with or approaching near to any portion of the road established by this company, at any suitable and conve-

nient point, any person or freight, and transport the same to any point on said railroad, when persons or freight may be safely and conveniently landed, agreeably to the wishes of such person or the owner of such freight, on the payment or offer of payment of the same rate of tolls established by said company, for the same portion of their said railroad traversed by such person or freight: *Provided*, That said railroad company connecting with or approaching this line of
21 railroad be required in like manner to transport persons and
freight on their railroad arriving from this: *And provided also*, That from the city of Portland the said company shall have authority to connect thence with any other railroad established by law leading to Boston, in Massachusetts, in the most direct and feasible manner, and so as best to accommodate the travelling public, the consent of the proprietors thereof being first obtained. Such connection to be made in such manner as shall be designated by the engineer employed by said company to survey and construct their said railroad, and the engineer employed to survey and construct such other railroad.

SECT. 8. *Be it further enacted*, That if any persons shall wilfully or wantonly obstruct the passage of any carriage on said railroad, or in any way injure or destroy said railroad, or any part thereof, or anything belonging thereto, or any material or implement to be employed in the construction or for the use of said railroad, he, she, or they, or any person or persons assisting, aiding, or abetting such trespass, or committing, or *in* aiding or assisting in the commission of any other trespass on said railroad or anything connected therewith, shall forfeit and pay to the use of said company treble damages by them sustained, to be sued for and recovered in an action of
22 debt, or of the case, by such person or officers as the directors
shall from time to time appoint, before any court of competent jurisdiction. And such offender or offenders shall be liable to indictment by the grand jury of the county within which such trespass shall have been committed, for any offence or offences done in violation of the above provisions; and on conviction thereof before any court competent to try the same, shall pay a fine not exceeding one hundred dollars to the use of the State, or be imprisoned for a time not exceeding one year, either or both, at the discretion of the court before whom such conviction may be had.

SECT. 9. *Be it further enacted*, That the provisions of an "act concerning corporations," passed March seventeenth, one thousand eight hundred and thirty-one, shall not extend or apply to the company hereby incorporated.

SECT. 10. *Be it further enacted*, That the first meeting of the company may be called at Brunswick, by the three persons first named in the first section of this act, by publishing the notice of such meeting three weeks successively in one or more of the newspapers published at Augusta, Gardiner, Brunswick, and Portland; the last publication to be at least ten days before the time appointed for such meeting.

23 SECT. 11. *Be it further enacted*, That it shall be the duty of

said company to transport the United States mail on their railroad for a reasonable compensation, if required so to do by the Postmaster General; and if the Postmaster General and the directors of said company cannot agree on the compensation to be allowed by the Post Office Department to said company for such service, then the legislature may require said company to transport said mail for such compensation, not less than the actual expense incurred by said company in the transportation thereof, as the legislature may judge reasonable and proper, provided the Postmaster General should accede thereto.

SECT. 12. *Be it further enacted*, That the portion of this railroad route from Gardiner village to Augusta village, through Hallowell, shall be made and completed within one year from the time that the railroad and works thereon from the village of Gardiner to the city of Portland shall have been completed and put in operation; the route and termini to be designated by some skilful and experienced engineer, to be employed by said company to make their survey, in the most practicable manner, having due regard to the accommodation of the public and the interests of said company:

Provided, That if such extension, in the manner and time
24 aforesaid, in the opinion of said engineer, shall require an extension of their capital stock, then a further time of one year shall be allowed to said company so to complete said route.

But no construction shall be given to the provisions of this act which shall tend to exonerate or prevent said company from the duty or right of connecting the village of Augusta through Hallowell, as aforesaid, in the most commodious manner, with the railroad from Gardiner village to the city of Portland: *And provided, further*, That if any other railroad shall be granted by the legislature, and its construction commenced before the time allowed to the corporation by this act to complete the same, either between Portland and Augusta, or Gardiner and Augusta, so as to divert travel from this road, then this corporation shall not be required to complete the section between Gardiner and Augusta.

He also introduced and read the law of Feb. 16, 1836, referred to in the charter and making part of it, and which makes part of the case, and is as follows, to wit:

AN ACT concerning corporations.

SECT. 1. *Be it enacted by the senate and house of representatives in legislature assembled*, That from and after the passing of this act all corporations created by the legislature, or which shall be estab-
25 lished under existing laws, shall be capable, in their corporate name, to sue and be sued, appear, prosecute, and defend to final judgment and execution, in any courts of record, or in any other place whatever; to have a common seal, which they may alter at pleasure; to elect, in such manner as they shall determine, all needful officers; to fix their compensation, and to define their duties, obligations, and

liabilities, consistent with the constitution and laws of the State, for their own government, and for the due and orderly conducting of their affairs and the management of their property.

SECT. 2. *Be it further enacted*, That the mode of calling the first meeting of all corporations, unless otherwise specially provided for, shall be by a notice, setting forth the time, place, and purposes of the meeting, signed by any one or more of the persons named in the act of incorporation, and fourteen days at least previously to the meeting delivered to each member, or published in some newspaper or newspapers in the county where the corporation may be established, or if there be no newspaper, then in a newspaper in some adjoining county.

SECT. 3. *Be it further enacted*, That in all corporations hereafter created by the legislature, except banking corporations, unless otherwise specially provided for in the act of incorporation, the shares of individual stockholders shall be liable for the debts of the corporation.

26 And in case of deficiency of attachable corporate property or estate, the individual property, rights and credits of any stockholder shall be liable to the amount of his stock for all debts of the corporation contracted prior to the transfer thereof for the term of one year after the record of the transfer in the books of the corporation, and for the term of six months after judgment recovered against said corporation, in any suit commenced within the year aforesaid, and the same may be taken in execution on said judgment in the same manner as if said judgment and execution were against him individually, or said creditor, after said judgment, may have his action on the case against said individual stockholder; but in no case shall the property, rights, and credits of said stockholder be taken in execution, or attached as aforesaid, beyond the amount of his said stock.

SECT. 4. *Be it further enacted*, That it shall be the duty of the officer having said execution to appropriate towards the satisfaction thereof, in part or in whole, any corporate property or estate which he can find; and if sufficient cannot be found, to certify said deficiency on said execution, and to notify the individual stockholder by giving him forty-eight hours' previous notice thereof, whose property he is about to take; and if said stockholder resides out of the State,
27 said notice shall be given to his agent, if he has any in the
State, otherwise to the clerk of said corporation; and if such individual stockholder, his agent, or said clerk, on demand of said officer, and notice as aforesaid, shall disclose and show to the execution creditor or officer attachable corporate property or estate sufficient to satisfy said execution and all fees, his individual property, rights, and credits shall thereupon be exempt from attachment and execution. And said action on the case shall not be commenced against said stockholder until demand and notice as aforesaid.

SECT. 5. *Be it further enacted*, That said individual stockholder, whose property, rights, and credits shall be attached and taken as aforesaid, shall have his remedy at law or in equity against said corporation, to reimburse him for all moneys paid as aforesaid, and to recover such damages as he may have sustained by the neglect of said corporation to satisfy said execution. And in case of a deficiency of corporate property or estate wherewith to satisfy said judgment or decree as said individual stockholder may recover or obtain as aforesaid, said stockholder may have his remedy as aforesaid for a contribution, in proportion to their respective stock in said corporation, against the stockholders who were liable for the corporate debt sued for in said action against said corporation.

28 SECT. 6. *Be it further enacted*, That it shall be the duty of the clerk of said corporation, on demand, to furnish the officer having the execution against said corporation with the names and place of residence of the stockholders who may be liable as aforesaid.

SECT. 7. *Be it further enacted*, That all provisions of law touching the subject-matter of corporations, and not inconsistent with this act, shall not be affected thereby, and this act shall take effect from and after its passage. (Approved by the governor February 16, 1836.)

He also introduced and read the original books of record of the Kennebec and Portland Railroad Company, showing an acceptance of said charter, and a legal organization of the corporation under the same on October 28, 1846, and proved that said corporation had complied with all the provisions of said charter, and had constructed a railroad in accordance therewith, between Portland and Augusta, the termini named therein, and commenced running cars about January 1, 1852, for the transportation of passengers and freight over said road, and have continued to do so from that time to the present.

He also proved that said corporation became embarrassed
29 with debt in 1852, and have been in an insolvent condition
from that time to the present. That the defendant, Calef, was chosen one of the directors of said company at the first meeting after the organization thereof under their charter; that he was an original stockholder when the company was first organized, holding ten shares of one hundred dollars each; that between November, 1850, and August, 1833, he purchased one hundred shares more, of which he subsequently sold eighty-five shares, still retaining the ownership of twenty-five shares, of one hundred dollars each, and was such owner at the time the plaintiff's debt was contracted, which was for railroad sleepers to repair the road between Augusta and Portland, in August and October, 1855, the same being then out of repair; that he continued to own said twenty-five shares from the time the plaintiff's debt aforesaid was contracted to the time when he obtained judgment thereon, in December, 1857, as set forth in the writ. In answer to an interrogatory by the plaintiff, the defendant testified as follows: "I ceased to be an owner February 26, 1858. at which time I sold twenty-five shares, the balance of my ownership." No other proof was offered by either party relating to any sale or transfer of these shares, except the foregoing statement of the defendant. Nor did it anywhere appear that any sale or transfer, or any

30 record thereof, was ever made or entered in any book or record of the corporation.

The plaintiff next introduced and read an act of the legislature of Maine, passed March 31, 1845, being chapter 273 of the special laws of that year, relating to the Ken. and Por. R. R. Co., which makes part of the case, and is as follows, to wit:

AN ACT in addition to the act incorporating the Kennebec and Portland Railroad Company.

Be it enacted by the senate and house of representatives in legislature assembled, as follows:

SECT. 1. That the time now allowed by law to the Kennebec and Portland Railroad Company to complete the survey and make return of the same is hereby extended five years, and the time for the stock to be taken up to six years, and the time for the completion of the whole road to ten years, from the day this act shall be approved by the governor.

SECT. 2. If said railroad shall, in the course thereof, cross any tide-waters, navigable rivers or streams, the said corporation are hereby authorized and empowered to erect, for the sole and exclusive travel on their said railroad, a bridge or causeway across each of said rivers or streams, or across any such tide-waters; provided said bridge or bridges, or causeways, shall be so constructed as not to obstruct or impede the navigation of said waters.

SECT. 3. All real estate purchased by said corporation for the use of the same, under the sixth section of the act to which this is an addition, shall be taxable to said corporation by the several towns, cities, and plantations in which said lands may lie, in the same manner as lands owned by private persons, and shall in the valuation list be estimated the same as other real estate of the same quality in such town, city, or plantation, and not otherwise; and the shares owned by the respective stockholders shall be deemed personal estate, and be taxable as such to the owners thereof, in the places where they reside and have their home. And whenever the net income of said corporation shall have amounted to ten per centum per annum upon the cost of the road and its appendages and incidental expenses, the directors shall make a special report of the fact to the legislature; from and after which time one moiety, or such other portion as the legislature may from time to time determine, of the net income from said railroad, accruing thereafter, over and above ten per centum per annum, first to be paid to the stockholders, shall annually be paid over by the treasurer of said corporation as a tax into the treasury of the State, for the use of the State; and the State may have and maintain an action against said corporation to recover the same. But no other tax than herein is provided shall ever be levied or assessed on said corporation, or any of their privileges or franchises.

SECT. 4. Said corporation shall have power to connect their road with any other railroad at such point as may be most conve-
31 nient on the route established by the act to which this act is an addition.

Sect. 5. The first meeting of this company shall be held in the town of Gardiner; and any three persons named in the act of incorporation are hereby authorized to call the first meeting of said corporation by giving notice in one or more newspapers published in the town of Augusta and the city of Portland of the time and place and the purposes of such meeting, at least twenty days before the time mentioned in such notice.

Sect. 6. All acts and parts relating to the Kennebec and Portland Railroad Company inconsistent with the provisions of this act are hereby repealed. (Approved March 31, 1845.)

He also introduced and read an act of said legislature, passed July 16, 1846, relating to said company, being chapter 341 of the special laws of that year, which make a part of the case, and is as follows, to wit:

AN ACT in addition to the act incorporating the Kennebec and Portland Railroad Company.

Be it enacted by the senate and house of representatives in legislature assembled as follows:

Section 1. The Kennebec and Portland Railroad Company is authorised and empowered to locate their road through and east of the village of Brunswick, and to extend the same to tide-waters in
32 the village of Bath, by a branch of their road or otherwise,
and that part of the road or branch between Brunswick and Bath shall be completed simultaneously with the part of the road between Portland and Brunswick.

Sect. 2. The capital stock of said company shall be divided into shares of one hundred dollars each, instead of two hundred dollars, as is provided in the act to which this is an addition.

Sect. 3. The said company shall have the same *the same* power to construct bridges and causeways across tide-waters in the south of said road and branch, and with the same conditions and restrictions as are granted to the Bath and Portland Railroad Company by the fifteenth section of the act incorporating said company.

Sect. 4. The said company shall have power to complete any section of their road, commencing at Portland and proceeding east, and to take passengers and freight before the whole of the road is built, and charge thereof in the proportion that the distance run bears to the whole length of the road, as provided for in the bill to which this bill is an addition.

Sect. 5. The doings of said corporation at their first meeting called under the act establishing the same, and at the several ad-
33 journments thereof, and in calling said first meeting, are
hereby made valid in law; and said corporation may at any subsequent adjournment elect, in the manner prescribed by law, all the officers provided for by said act, first giving ten days' notice of an intention so to do in some newspaper printed in each of the cities of Boston and Portland, and in each of the towns of Bath, Gardiner, Hallowell, and Augusta. (Approved July 16, 1846.)

The plaintiff next introduced and read the records of the judgments recovered by him in this court at the Dec. term, 1857, against the Ken. and Port. Railroad Company. The judgments were in the usual form, and were for the amount and sums alleged in his writ in the present suit. And he proved that the debts on which said judgments were recovered were for railroad sleepers, furnished by him in August and Oct., 1855, to repair the railroad between Portland and Augusta, and were used for that purpose. He also introduced and read the original writs against said Ken. and Port. Railroad Company, returnable to this court at its March term, A. D. 1856, one bearing date Feb. 14, 1856, the other January 19, 1856, and he proved by the officer's return on said writs that they were duly served on said company; and by the docket and records of the court, that they
34 were duly entered at the return term, and thence continued
from term to term till Dec. term, 1857, when the plaintiff recovered judgments as before described. The plaintiff next proved that within three months after the recovery of said judgments, viz: on March 17, 1858, he sued out executions from this court on each of said judgments, against said Kennebec and Portland Railroad Company, and placed the same for service in the hands of Jabez S. Currier, a deputy sheriff in and for the county of Kennebec, where said corporation had a place established by law for the transaction of their corporate affairs and business. And said deputy sheriff, on March 24, 1858, made a return on each of said executions, that he had made diligent search for attachable corporate property with which to satisfy said executions, and could find none within said county of Kennebec, and he therefore returned the same in no part satisfied. The plaintiff next proved that afterwards, to wit, on the same day, he placed said executions for service in the hands of Phineas Libbey, 2d, a deputy sheriff in and for the county of York, where said defendant resides, who on the same day made his return on each of said executions, that he had made diligent search for attachable corporate property with which to satisfy said executions, and could find none in said county of York, and therefore returned the same in no
35 part satisfied. The plaintiff then proved that afterwards, and
on the same March 24, 1858, he again placed said executions in said Libbey's hands as a deputy sheriff, and that he went in company with said officer to the defendant's house, in Saco, in the county of York, said Libbey then and there having said executions ready for service, and presented said executions to the defendant, and demanded of him, as a stockholder in said Ken. and Port. Railroad Company, to disclose and show to said officer having said executions attachable property of said company sufficient to satisfy the same, which the defendant then and there refused and declined to do. He also proved that said officer holding said executions made for him, and in his presence, at the same time and place, a similar demand on said defendant to show him attachable corporate property to be taken on said executions, which the defendant then and there refused to do.

The executions, with the officer's return of service thereon, may be referred to.

No objection was made by the defendant to the regularity and correctness of all the proceedings of the plaintiff to establish his right to recover of the defendant the amount of his stock in said corporation; and the court instructed the jury that the plaintiff's proceedings were regular and in accordance with the provisions of the law, so
36 far as that branch of the case was concerned. And to this instruction no objection was made nor exception taken by the defendant.

The plaintiff here rested his case.

The defendant offered no evidence; but he introduced and read an act of the legislature, passed April 9, 1856, and which took effect on May 10, 1856, being chapter 271 of the public laws of that year, which makes part of the case, and is as follows, to wit:

AN ACT relating to the liability of stockholders of corporations.

Be it enacted by the senate and house of representatives in legislature assembled, as follows:

Sect. 1. The stockholders of all corporations created by the legislature after the sixteenth day of February, in the year eighteen hundred and thirty-six, excepting banking corporations, unless it is otherwise specified in their charter, or by any general law of the State, shall be liable for the debts of the corporation contracted during their ownership of said stock, in case of deficiency of attachable property of the corporation, to the amount of their stock, and no more. And such liability shall continue, notwithstanding any subsequent transfer of such stock, for the term of one year after the record of the transfer thereof on the books of the corporation.

Sect. 2. At any time within six months after the return of
37 an execution against a corporation unsatisfied, in whole or in part, for want of attachable property of the corporation, the plaintiff in such execution may make demand of any stockholder of such corporation to disclose and show to the officer having said execution attachable property of said corporation sufficient to satisfy the execution.

Sect. 3. After demand, as aforesaid, the execution creditor may have an action of the case against such stockholder, to recover from him individually the amount of his execution and costs, or the deficiency thereof, not exceeding the amount for which said stockholder is liable by the first section hereof. Such action must be commenced within six months after the date of the rendition of the judgment against the corporation.

Sect. 4. In such action said stockholder may prove in reduction of his liability the amount of debt of the corporation which he has previously paid, and which has not been repaid to him by such corporation; also any debt due him from such corporation, for which he at the time might maintain an action at law against said corporation, and may show any other legal cause why judgment should not be rendered against him.

38 Sect. 5. The treasurer of every such corporation shall keep a full record of all claims in favor of its stockholders against

the corporation, and exhibit the same, with a particular statement of the financial condition of such corporation, to any creditor of the corporation when requested by him; and in failure of exhibiting such statement, the stockholders of such corporation shall not be entitled in actions against them to show previous payments on account of the corporation in reduction of their liability; but such stockholders, if they suffer damage by reason of being thus deprived of their defence, may have a remedy upon the board of such treasurer.

SECT. 6. The eighteenth, nineteenth, and twentieth sections of chapter seventy-six of the revised statutes, and the "act to amend the seventy-sixth chapter of the revised statutes," passed March sixteenth, eighteen hundred and fifty-five, are hereby repealed, saving all suits and processes now pending under and by virtue of them, which suits and processes shall continue and be completed as if this act had not been passed. (Approved April 9, 1856.)

And the defendant contended that by said act the plaintiff's right to recover in this suit was taken away and destroyed, and requested the court so to instruct the jury.

On the other hand the plaintiff contended:

39 1st. That the act of April 9, 1856, was a mere re-enactment and consolidation of former laws and statutes, and did not operate, and was not designed, intended, or understood by the legislature to operate as a repeal or destruction of the rights acquired under the laws existing prior thereto, and could not operate to repeal rights acquired under them.

2d. That the commencement of a suit, and the recovery of a judgment thereon, against the Ken. and Port. Railroad Company constituted an important and absolutely indispensable part of the process in behalf of the plaintiff against the defendant as a stockholder in said company, and were, in fact, the commencement of that process, and that all the subsequent steps took effect by relation from that time; that the plaintiff having commenced his suits against the Kennebec and Portland Railroad Company in January and Feb., 1856, before the act of April 9, 1856, was passed, and said suits being pending at the time of its passage were expressly saved by the language of the act itself.

3d. That by the charter of the Kennebec and Portland Railroad Company the stockholders therein were responsible for the debts of the company to the extent of their stock; that such responsibility 40 to the creditor, who trusted the company upon the strength of it, was a contract within the meaning of the Constitution of the United States, and could not be affected or impaired by any subsequent act of the legislature. That if the jury should be satisfied from the evidence in the case that the Kennebec and Portland Railroad Company was insolvent in August and Oct., 1855, when the plaintiff furnished the railroad sleepers to repair their road, and that the plaintiff furnished them in good faith, and trusting to the credit and responsibility under the charter of the defendant and other stockholders for his pay therefor, and the same were actually used for the repair of said road, and thereby went to the benefit of the stockholders, that a contract within the meaning of the Constitution of the United States was created between the plaintiff and the defendant, to pay the plaintiff for the sleepers thus furnished, to the extent and amount of the defendant's stock; and that so far as the act of April 9, 1856, takes away the right of the plaintiff to recover his pay under said contract, it violates the contract, impairs its obligations, is in conflict with the Constitution of the United States, and is therefore inoperative and void.

And the plaintiff requested the court to instruct the jury in accordance with the foregoing propositions.

41 For the purposes of this trial the court refused so to do; but did instruct the jury—

1. That the law of April 9, 1856, was not a re-enactment and consolidation of former laws and statutes, but a repeal of the same, and destroyed all rights acquired under laws existing prior thereto, except so far as expressly saved and preserved by the last section thereof.

2. That the present suit and the proceedings upon which it is grounded do not fall within the saving clause of that section, and are not, therefore, saved thereby.

3. That by the character of the Kennebec and Portland Railroad Company, as held by the full law court of this State, the stockholders therein were responsible for the debts of the company to the extent of their stock; but that such responsibility, under said charter, to a creditor who trusted the company upon the strength of it, did not constitute a contract between the creditor and such stockholder within the meaning of the Constitution of the United States; and that if the jury should be satisfied of the truth of all the facts stated in the plaintiff's third requested instruction, still no contract was created thereby between the plaintiff and defendant. That but for the act of April 9, 1856, the plaintiff would clearly be entitled to recover in this action; but that act had wholly taken away and 42 destroyed all right of the plaintiff, under said charter, to recover anything of the defendant, and the verdict of the jury must therefore be returned for him; and that said act was constitutional and valid, and not inoperative or void.

No other instructions were requested by either party, and none other were given by the court of the jury.

No instruction was requested by the defendant, and none was given by the court, as to the effect or non-effect of the defendant's ceasing to own stock in said company on Feb. 26, 1858, there having been no record made of any transfer on the books of the company. Under the foregoing instructions of the court the jury returned a verdict for the defendant; and they specially stated therein that it was grounded wholly upon the foregoing instructions of the court to them; that all right of the plaintiff to recover was taken away by the act of April 9, 1856, and that *that* act was constitutional and valid, and not inoperative or void.

To the foregoing instructions and refusals to instruct, the plaintiff respectfully excepts, and prays that his exceptions may be allowed and certified.

By D. D. STEWART, *his Attorney.*

The foregoing exceptions having been duly taken in open court, and before the final adjournment thereof, and during the trial of the aforesaid action, and being found conformable to the truth, are allowed.

JOHN APPLETON,
Justice Supreme Judicial Court of Maine.

43 This case was then marked Law, and all further proceedings here suspended until the same should be determined by the law court. This case was thence continued from term to term until this term, and on the twenty-seventh day of July, A. D. 1862, the following order from the district clerk for the middle district was received and filed in the clerk's office of this court, to wit:

CLERK'S OFFICE, SUPREME JUDICIAL COURT,
Augusta, July 25th, 1862.

I hereby certify that I have received from the clerk of said court, sitting at Portland, in the county of Cumberland, (July law term, 1862,) an order to make upon the law docket of the supreme judicial court, holden for the middle district, on the third Tuesday of June, 1862, under the action, Going Hathorn *vs.* Josiah Caleff, transferred from the docket of said court, in the county of Somerset, as a case marked "Law," the following entry, and to certify the same forthwith to the clerk of said court for the said county of Somerset, to wit: "*Exceptions overruled, judgment on the verdict.* In this case there was drawn in question the validity of a statute of the State of Maine, passed on April 9, 1856, entitled 'An act relating to 44 the liability of stockholders of corporations,' being chapter 271 of the laws of 1856, on the ground that it was repugnant to the Constitution of the United States, and the decision of the court was in favor of the validity of said statute."

WM. M. STRATTON,
Dist. Clerk, Mid. Dis.

TO JAMES W. MERRILL, Esq.,
Clerk Sup. Jud. Court, County of Somerset.

And now, as of this term, the defendant appears and prays judgment for his costs. It is, therefore, considered by the court here that the said Josiah Califf recover judgment for his costs in this case against the said Going Hathorn, taxed at thirty-nine dollars and ninety-eight cents. And now within ten days after the recovery of the judgment aforesaid, to wit: on August 5, 1862, the said Going Hathorn filed in the office of the clerk of this court a writ of error to the Supreme Court of the United States, duly allowed by the Hon. Nathan Clifford, one of the associate justices of said court, and issued by the clerk of the circuit court of the United States, Maine district, and also filed the bond required by law, and duly approved by said justice; and he also filed in said office a copy of said writ of error, duly attested by said clerk, for the benefit of said Calef; and he also filed in said office the citation issued by said justice of said Supreme

Court of the United States to said Calef, and a copy of said writ of error and of said citation, with the officer's return of service thereon, which, together with the original bond, now remaining in this office.

45 Wherefore execution and all further proceedings are stayed in this court until the decision of the Supreme Court of the United States shall be made known on the premises.

A true record.

Attest: JAS. W. MERRILL, *Clerk.*

STATE OF MAINE, *Somerset, ss:*

CLERK'S OFFICE, SUPREME JUDICIAL COURT, NORRIDGEWOCK.

In testimony that the foregoing is a true copy of the whole record in suit, Going Hathorn, plaintiff, *v.* Josiah Caleff, defendant, remaining in this court, I make this certificate, and hereunto set my [L. S.] hand and affix the official seal of the court aforesaid, the eighth day of October, in the year of our Lord one thousand eight hundred and sixty-two.

STEPHEN D. LINDSEY,
Clerk of the Supreme Judicial Court, in the county aforesaid.

STATE OF MAINE, *Somerset, ss:*

I, John S. Tenney, chief justice of the supreme judicial court [SEAL.] of the State of Maine, hereby certify that Stephen D. Lindsey, esquire, whose signature is above affixed, is clerk of the supreme judicial court of said State for the county of Somerset, and is by law the proper person to make out and certify copies of all records and proceedings of the supreme judicial court holden within and for said county of Somerset; and that full faith and credit is and ought to be given to his acts and attestations done as aforesaid, and that his attestation is in due form of law.

In testimony whereof, I have hereunto set my hand and the seal of said court this eighth day of October, anno Domini one thousand eight hundred and sixty-two, and in the eighty-seventh year of the independence of the United States of America.

JOHN S. TENNEY.

Supreme Court of the United States.

DECEMBER TERM, 1863.

GOING HATHORNE,

PLAINTIFF, IN ERROR,

VS.

JOSIAH CALEFF.

OPENING ARGUMENT FOR THE PLAINTIFF.

BOSTON:
PRINTED BY ALFRED MUDGE & SON, 34 SCHOOL STREET.
1864.

Supreme Court of the United States.

DECEMBER TERM, 1863.

GOING HATHORNE, PLAINTIFF, IN ERROR,

vs.

JOSIAH CALEFF.

OPENING ARGUMENT FOR THE PLAINTIFF.

STATEMENT OF THE CASE.

The Kennebec & Portland Railroad Company was incorporated by an act of the Legislature of the State of Maine, April 1, 1836. Its charter is set out on the record, page 9.

By this act, Robert Hallowell Gardiner and others named, with their associates and successors, are made a corporation, "subject to the liabilities and duties provided for by an act concerning corporations, passed February sixteenth, one thousand eight hundred and thirty-six, so far as the same is made applicable to railroads heretofore incorporated."

By the third section of the last named act (Record, page 14), it is provided, in reference to all corporations thereafter created, except banking corporations, that "in case of deficiency of attachable corporate property or estate, the individual property, rights, and credits of any stockholder shall be liable to the amount of his stock for all debts of the corporation contracted prior to the transfer thereof, for the term of one year after the record of the transfer in the books of the corporation, and for the term of six months after judgment recovered against said corporation, in any suit commenced within the year aforesaid, and the same may be taken in execution on said judgment in the same manner as if said judgment and execution were against him individually, or said creditor, after said judgment may have his action on the case against said individual stockholder; but in no case shall the property, rights, and credits of said stockholder be taken in execution or attached as aforesaid, beyond the amount of his said stock."

In 1841, before this corporation was organized, there was a revision of all the statute laws of the State, and this act of February 16, 1836, was included in that revision, and the substance of the above quoted section was included in chapter 76, sections 18, 19, and 20 of the Revised Statues of 1841.

The plaintiff in error having recovered a judgment against the corporation which he was unable to satisfy out of the property of the corporation, which was insolvent, brought his action against the defendant, who was a stockholder, to the amount of twenty-five hundred dollars, when the debt to the plaintiff was contracted, and when the judgment thereon was recovered, and no transfer of whose stock had been recorded in the books of the corporation.

The evidence exhibited at the trial showed, and the Jury so found, that the debt to the plaintiff was contracted by the corporation while insolvent, for railroad sleepers, on August 1st and October 20th, 1855. (Record, page 6.) The Court instructed the Jury, among other things, "that but for the act of April 9th, 1856, the plaintiff would clearly be entitled to recover in this action, but that act had wholly taken away and destroyed all right of the plaintiff under the said charter to recover anything of the defendant, and the verdict of the Jury must therefore be returned for him; and that said act was constitutional and valid, and not inoperative or void. (Record, page 21.) To this and the other instructions the plaintiff having duly excepted, and the Jury having found for the defendant, pursuant to the said instruction, the case was carried before the Supreme Court of Maine, at its general term, sitting as a court of law, and being the highest court of that State, and the plaintiff's exceptions were overruled and judgment rendered on the verdict.

The act of April 9th, 1856, which the Supreme Court of Maine held destroyed the plaintiff's right of recovery, is set out at page 19 of the record. But it does not seem to be material particularly to notice its provisions, because its legal effect to destroy the plaintiff's rights, if it be a constitutional and valid law, is not, by this writ of error, drawn in question; the sole question here being, whether this law be, as held by the Supreme Court of Maine, a constitutional and valid law, or whether it impaired the obligation of a contract with the plaintiff, within the meaning of the Constitution of the United States.

Upon this question the plaintiff submits:

I. That the law in question impaired the obligation of *a contract between the plaintiff and the defendant.*

Of this there can be no question, if any such contract existed.

What the plaintiff has to show, to support this point, is that out of the provisions of the charter, and of the law which made part of the charter, and the action of the defendant in becoming a member of the corporation, and of the plaintiff in giving credit for his goods, some contract arose between the plaintiff and the defendant. If there was any such contract, the law in question affects to release it; and, necessarily, is in conflict with the Constitution.

1. If the defendant had signed a writing, declaring that he would be responsible, to the extent of twenty-five hundred dollars, for any debt or debts of the corporation, and the plaintiff had, upon the exhibition of that writing, sold the corporation goods to that amount, the corporation being at the time insolvent, a contract between the plaintiff and defendant would have arisen out of that transaction.

Lawrason *vs.* Mason, 3 Cranch, 492. Louisville Man. Co., *vs.* Welch, 10 How. 461.

2. The actual facts were, in substance, equivalent to that transaction.

The fundamental law of the corporation, *its charter*, taken in connection with the law of the State, contained this assurance.

The defendant, by becoming a stockholder, assented to this assurance.

The plaintiff, by giving credit to an " insolvent and embarrassed " corporation, trusted to this assurance, and thus a contract arose between the plaintiff and the defendant.

The fact that this assurance was contained *in the charter* and the law of the State, instead of in a private writing, is of no importance, save that a presumption arises that the plaintiff and the defendant, and all others dealing with the corporation, had knowledge of the provision.

A charter is a contract between the State and the corporation, but not necessarily between them only. If it contain provisions on which third persons are invited to give credit, and which hold out assurances to them, if they will give credit, that a certain fund, or certain persons, will become responsible, such assurances, when accepted and acted on, become a contract, the obligation of which is protected by the constitution.

Thus in Woodruff *vs.* Trapnal, 10 How. 190, a charter contained the assurance that the bills of a bank would be accepted in payment of public dues. This was held to create a contract with all persons who should receive the bills while the assurance remained unrepealed, and though some judges dissented, no one expressed a doubt which can touch the case at bar.

So in Curran *vs.* the State of Arkansas, 15 How. 304, the charter of a bank contained an assurance that a certain fund should be responsible for the debts of the bank, and this was held to amount to a contract with creditors not to divert that fund from the payment of their debts.

It is respectfully submitted that the provisions of the charter which declare, in substance, that the stockholders shall be liable for the debts of the corporation, to the amount of their stock, when acted on by giving credit to the corporation, created a contract between the stockholders and creditors, in the nature of a letter of credit, or offer of guaranty accepted and acted on.

It has been held, upon great consideration, by the courts of New York, that such an act of incorporation leaves the stockholders to stand as original contractors, and liable as such original contractors, for the debts of the corporation; and the fact that the legislature has required the remedy against the corporation to be exhausted before proceeding against the stockholder does not vary the nature or ground of his liability.

In the case of Corning *vs.* McCullough, 1 Comstock 47, the Court say:

"The original stockholders, by their acceptance of the charter, and subsequent purchasers in becoming members, assented and agreed to the terms and conditions of the act of incorporation. The defendant in this suit, in common with the other stockholders, by his acceptance of the charter, agreed to its terms, and especially to that feature of it so strongly marked, of the individual liability of the stockholders equally with that of the corporate body for the debts of the company. It is a liability which every stockholder must be understood to assume and take upon himself, and to be under to those who deal with the company. Dealers contract with the corporation on the faith of that security for the performance of the contract. The credit they give is given, and they trust as well to the personal liability of the stockholders, as to the responsibility of the corporation, for the fulfilment of the engagement; and each stockholder incurs that liability to the creditor the moment the contract of such creditor with the company is consummated. When, therefore, the plaintiffs sold and delivered their merchandise to the company whereof the defendant was a stockholder, they acquired a right, of which nothing could divest them, to the liability of the defendant for the payment of the price of the goods; and the defendant incurred the obligation to answer and pay the debt thus contracted. The creditors were, it is true, required by the tenth section of the act of incorporation first to obtain judgment against the corporation (unless previously dissolved) for their demand, and to cause execution to be issued thereon, which was to be returned unsatisfied, in whole or in part, before they commenced their suit therefor against the individual stockholder, on his personal liability. But this provision does not affect the right of the creditor to the personal liability of the stockholder for his debt, nor the obligation of the stockholder to pay the same; nor does it prevent the liability of the stockholder to the creditor from attaching and becoming perfect on the consummation of the contract of the creditor with the corporation; it simply defers the remedy, by action upon that responsibility, until the remedy at law against the corporation shall be exhausted, or the corporation shall have been dissolved. The intention of it is to secure the stockholder from an immediate recourse to him upon his personal liability when the corporation may be solvent and able to pay the debt, and the creditor may have an effectual remedy against the corporate body for his demand."

And in Conant *vs.* Van Schaick, 24 Barb. 87, the question now under consideration arose; and it was held that a law repealing the liability of stockholders, was inoperative as to existing creditors, because it would impair the obligation of their contracts.

II. But if it should be held that no contract whatever existed with the plaintiff, save his contract with the corporation; still, the law in question did impair the obligation of *that* contract.

When these debts were contracted by the corporation, it was, in the language of the finding of the jury, "in an embarrassed and insolvent condition." The judgments which were recovered against the corporation remained unsatisfied and no property of the corporation sould be found to satisfy them.

The case then stands thus: When the debts were contracted the plaintiff had two remedies; one against the corporation, the other against the stockholders. The former was, and was known to be, wholly useless; the latter was sufficient and effectual; and the law in question has destroyed this sole efficient and effectual remedy, and substituted no other in its place. Such a law impairs the obligation of the contract, to enforce which the remedy was given.

The principle which is decisive of this case, was laid down in Green *vs.* Biddle (8 Wheat. 1), and has been repeatedly affirmed and applied by this Court. That principle is, that a law, which so changes the nature and extent of existing remedies as materially to impair the rights of the creditor, impairs the obligation of his contract.

In Bronson *vs.* Kinzie, 1 How. 311, the State law restrained the creditor from cutting off the right of redemption of mortgaged property, by a sale under a power contained in the mortgage; and gave twelve months after such sale to redeem the property.

It did not affect the plaintiff's right of action against the debtor to recover the debt. It did not release the property held as collateral security for the debt; but it encumbered the remedy of the creditor upon his collateral security, so as materially to impair it. *For this reason* the law was held invalid.

In the case at bar, while the law in question does not affect the plaintiff's right of action against an insolvent corporation which contracted the debt, it wholly deprives him of all recourse to his remedy on the property of the stockholders, which the charter had made liable for the debt. The difference between the two cases is, that in the case decided, the collateral remedy for the debt was only materially impaired; in the case at bar it is destroyed. This decision has been repeatedly affirmed and applied by the Court. (McCracken *vs.* Hayward, 2 How. 608. Gantly's lessee, *vs.* Ewing, 3 How. 707–716. Howard *vs.* Bugbee, 24 How. 461.)

In McCracken *vs.* Hayward, 2 Howard, 608, it was decided that a law prohibiting property from being sold on execution for less than two-thirds of its appraised value, so impaired the remedy as to be invalid, upon the ground that when the contract was made, the creditor had the absolute right to levy his execution and sell the property of the debtor. Now in the case at bar the charter of the corporation and the law of the State had conferred on the creditor the right to levy his execution on the property of the stockholders, or to subject their property to the payment of the debt by an action on the case. These laws of the State had, in the language of the Court, created this right, and attached it to the contract; it was part of its obligation. As was said by the Court in Curran *vs.* the State of Arkansas, 15 How. 319, "The obligation of a contract, in "the sense in which these words are used in the Constitution, is "that duty of performing it which is recognized and enforced "by the laws. And if the law is so changed that the means of "legally enforcing this duty are materially impaired, the obli"gation of the contract no longer remains the same." By the law now in question the only effectual means of enforcing the duty of performing the contract, which had been attached to it by the charter and the law of the State, with the assent of the stockholders, are wholly taken away. Instead of encumbering the right to levy an execution which belonged to the creditor, as in McCracken *vs.* Hayward, the right is destroyed.

Respectfully submitted by

B. R. CURTIS,

Of Counsel with the Plaintiff in Error.

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Supreme Court of the United States.

GOING HATHORN, Plaintiff in Error,

v.

JOSIAH CALEF.

Error to the Supreme Judicial Court of the State of Maine.

ARGUMENT FOR THE DEFENDANT.

Supreme Court of the United States,

DECEMBER TERM, 1863.

GOING HATHORN, Plaintiff in Error,
v.
JOSIAH CALEF.

In Error to the Supreme Judicial Court of the State of Maine.

ARGUMENT.

"As preliminary to any discussion of the particular matter, it may be observed, as an axiom of statute-construction, that, under the constitutional institutions of the

United States, every legislative act, duly enacted in form by the proper legislative body, is presumed to be law. The constituted authorities of a state are not to be presumed to enact anything which is either null *per se*, or null in reference to the constitution of the state or of the United States."

"Hence the burden of proof and of argument is with him, who denies the validity of the statute, or of any provision of the statute under consideration."

Besides this presumption in favor of its validity, the act of April 9, 1856, set out on page 19 of the record, as enacted by the legislature of Maine, is free, upon its face, from any signs of repugnancy to the Constitution of the United States. It does not, like many statutes, bristle with bold antagonisms to that instrument, so that inspection alone is sufficient to secure its condemnation as a nullity.

Much less does it seem, upon its face, to be a law impairing the obligation of contracts. Its aspect is rather that of a law intended to give additional strength to such obligations, by furnishing against strangers an additional remedy, in case of the default of one of the contracting parties. Its very purpose is to create a liability in stockholders for the debts of the corporations, of which they may be members. If it be invalid at all, it can be so only because of its attempted application to some particular case.

And so the plaintiff's counsel affirms correctly, that the sole question presented by this writ of error is—

"Whether this law be, as held by the Supreme Court of Maine, a constitutional and valid law,—or whether it impaired the obligation of *a contract with the plaintiff*, within the meaning of the Constitution of the United States."

Did it impair the obligation of any contract with the plaintiff, growing out of his sales of railroad sleepers to the Kennebec and Portland Railroad Company, in August and October, 1855?

The record of this action has some singular features, which suggest the suspicion that the case has been made up *unnecessarily*, with the concurrence of the counsel of both parties, and the court, and that the rights of the parties might have been fully determined, without bringing in question the validity of any statute of the State.

The declaration in the plaintiff's original writ closes with an averment that the defendant *promised* to pay the plaintiff the amount of defendant's stock — thus making it a declaration in *assumpsit*. An examination of the various statutes of Maine, will disclose the fact, that from the year 1836 to the present moment, the laws of Maine have never authorized an action of assumpsit to enforce the liability of individual stockholders for debts of their corporations.

The defendant's counsel, to this declaration, pleaded *non assumpsit*. Upon this issue, the plaintiff should have been non-suited — and it is submitted, that upon such an issue, made at the trial of his action, he has no right to prosecute this writ of error. He is not in a position to deny the validity of the act of 1856, upon the ground urged by him, for if the judgment of the state court

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should be reversed upon such ground, the plaintiff ought still to fail in his action of assumpsit.

By the record, page 21, the court is represented as instructing the jury —

"That, *by the charter* of the Kennebec and Portland Railroad Company, *as held by the full law court of this state,* the stockholders therein were responsible for the debts of the company to the extent of their stock;" and —

"That but for the act of April 9, 1856, the plaintiff would clearly be entitled to recover in this action; but that act had wholly taken away and destroyed all right of the plaintiff, *under said charter,* to recover anything of the defendant."

It is difficult to believe, that any jurist could have seriously given such instructions as these in the case, except for the purpose of aiding the plaintiff in his enterprise of bringing the case before this court.

"The full law court" of the state of Maine never has held, "that, by the charter of the Kennebec and Portland Railroad Company, the stockholders therein were responsible for the debts of the company to the extent of their stock." But on the contrary, that court has held, that such responsibility was imposed, not by the charter, but by the general statutes of the state; viz., the "act concerning corporations," of February 16, 1836, and after the repeal of that in 1841, by the 18th, 19th, and 20th sections of chapter 76. of the revised statutes of Maine, which took effect in 1841. *Coffin* v. *Rich*, 45 Maine Reports, p. 507.

In the same case of *Coffin* v. *Rich*, the court decided, that the act of April 9, 1856, defeated rights of action, not under said charter, but under the general statutes, which alone gave any right of action. The language of the court on page 512, is—

"After the statute of 1836 had been repealed by that of 1841, no rights existed under the former act except such as were expressly secured by the saving clause of the latter. *Longley* v. *Little*, 26 Maine Reports, p. 162."

And on the same page.:

"There can be no doubt, therefore, that the repeal of the statute of 1841, by that of 1856, defeated all rights under the former, except those which had already become vested by a judgment, or were saved by an action already commenced."

An examination of various statutes of Maine, which are supposed to be of equal authority with judicial decisions, will show the entire groundlessness of the instructions given by the court to the jury, and will aid essentially in the whole discussion of the question, whether the act of 1856 impaired the obligation of any contract with the plaintiff, growing out of his sales of railroad sleepers to the Kennebec and Portland Railroad Company, in August and October, 1855.

The act entitled, "an act concerning corporations," set out in the record, pp. 13, 14, and 15, was passed, and took effect February 16, 1836. One of the statements of counsel, in his bill of exceptions, set out in the record, p. 13, gratuitously describes this act as "making part of the charter" of the Kennebec and Portland Railroad Company.

The third section of this act enacts—"That in all corporations hereafter created by the legislature, except banking corporations, unless *otherwise* specially provided for in the act of incorporation, the shares of individual stockholders shall be liable for the debts of the corporation." And then follow provisions, which declare the extent of this liability, and the mode of enforcing it.

On the first day of April, 1836, "an act to incorporate the Kennebec and Portland Railroad Company," record, pp. 9 *et seq*, was passed.

In this act of incorporation, the subject of stockholders' liability was not "*otherwise* specially provided for." and consequently, the third section of the "act concerning corporations," applied to it.

This act of incorporation granted the powers necessary for the construction of the railroad contemplated, and this grant constituted the peculiar and valuable franchise which the act was designed to confer.

But in the first section, it declared the corporators therein named, their associates, successors, and assigns, a body politic and corporate, with all the general rights, privileges, and immunities incident to corporations, "and subject to the liabilities and duties provided for, by an 'act concerning corporations,' passed February sixteenth one thousand eight hundred and thirty-six, so far as the same is made applicable to railroads *heretofore incorporated*."

There is some obscurity in the meaning of this clause, arising from the last two words, but its true meaning is believed to be, that the corporation should be subject to the provisions of the act of February 16th, as to liabilities and duties, so far as they applied to railroads — so that if the provisions of that act should ever be repealed, these duties and liabilities imposed upon the corporation, whatever they might be, would cease.

However binding, as a contract, upon the state and the corporators, a charter duly accepted and acted upon, may be, it is certain that, until accepted, an act of incorporation is nothing but a simple enactment of the legislature, entirely subject to its control; subject to amendment, alteration, or repeal, at its pleasure. No contract is infringed by any alteration, because there are no contracting parties to it. It is no more, even under the law of contracts, than a *pollicitatio*, which, the party making the proposition, may modify or wholly retract at any time before its acceptance. — Chitty on Contracts, p. 12.

Every subsequent act of the legislature, having the force of law, may affect it, because, like all other simple acts of legislation, it must be controlled by laws enacted afterwards.

The act to incorporate the Kennebec and Portland Railroad Company remained a simple act of the legislature of Maine, without acceptance by the corporators, until October 28, 1846 — record, page 15, and page 6, finding of the jury.

In this interval, numerous changes had been made in it, by the power of its own provisions, and the action of the legislature.

It had become void, by virtue of its third section, which declared — record, p. 10:

"That this grant shall be void unless the route of said "railroad shall be surveyed and a return of said survey "be made to the county commissioners of the counties "through which said railroad shall pass, and to the gov-"ernor and council, on or before the first day of August, "one thousand eight hundred and thirty-seven."

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And it had remained void, forfeited, "having a name to live, but dead," for years, until it was revived by "an act in addition," approved March 31, 1845 — record, p. 16.

And when it was thus revived in 1845, there was no longer any "act concerning corporations," of February 16, 1836, in force, providing for liabilities and duties, and "made applicable to railroads heretofore incorporated," and "making part of" this act of incorporation.

That act had been repealed in 1841, by the general repealing act, revised statutes of 1841, pp. 779, 787, which declared:

"That all the statutes hereinafter mentioned, and de-"scribed by the years in which they were respectively "enacted, and by their respective titles and the number "of each chapter, be, and the same are hereby repealed."

"Acts passed in the year 1836."

"Chapter 200, an act concerning corporations."

And with the repeal of this act, the act of incorporation was expurgated of the provisions concerning liabilities and duties, which were dependent upon the act of February 16, 1836. And here it is submitted, that the legislature may at any time, unless the rights of third parties have intervened, remove *burdens* and *restrictions*, even if imposed upon the corporators by the most express terms of their charter, without violating any contract between them. It is only when the *rights* and *privileges* conferred by the charter are injuriously intermeddled with, that the action of the legislature can be held void upon any contract theory.

At this point, also, is the most convenient place to remark:

That the act of April 9, 1856, does not, expressly, or by implication, by any mode of construction known or conceivable, repeal, or in any way or degree, affect the act of February 16, 1836, or the act of incorporation of the Kennebec and Portland Railroad Company.

While the general repealing act of 1841, expressly repeals the act of February 16, 1836, the act of April 9, 1856, makes no more allusion to it than if itself had been but the blankest *tabula rasa*.

By its 6th section, record, p. 20, it expressly repeals the 18th, 19th, and 20th sections of chapter 76 of the revised statutes, which we shall have occasion to refer to more particularly in the course of this discussion; and it repeals the "act to amend the 76th chapter of the revised statutes," passed March 16, 1855, which substituted an action of *scire facias*, to enforce the liabilities of stockholders in corporations, for the action on the case before authorized. But it left the liabilities of stockholders of the Kennebec and Portland Railroad Company, — *so far as they were fixed by the charter of that corporation, and the act of February*, 16, 1836, — precisely the same as they were on the days when the plaintiff sold the sleepers to the corporation, and on the day when the charter was accepted.

By this, it is not meant, that the act of April, 9, 1856, took away from the plaintiff no right of action against the defendant.

It *did* take away from him a right of action, given by the 18th, 19th, and 20th sections of chapter 76 of the revised statutes, and the "act to amend the 76th chapter of the revised statutes," passed March 16, 1855.

But it *did not* take away any right of action conferred by the charter of the Kennebec and Portland Railroad Company, or by the act of February, 16, 1836, or by both conjointly, which is the error assigned in this writ, and the record, and urged in the argument of the plaintiff's counsel.

At the very same time when the act of February 16, 1836, was extinguished by the general repealing act of 1841, the legislature of Maine enacted the 18th, 19th, and 20th sections of chapter 76, of the revised statutes of that state, which provided:

"Sect. 18. In all corporations, enacted by the legis-"lature, after the sixteenth day of February, in the year "eighteen hundred and thirty-six, excepting banking "corporations, unless otherwise specified in their charter, "in case of deficiency of attachable corporate property "or estate, the individual property, rights, and credits "of every stockholder thereof, shall be liable to be taken "on execution to the amount of his stock and no more, "for all debts of the corporation, contracted during his "ownership of such stock; and such liability shall con-"tinue, notwithstanding any subsequent transfer of such "stock, for the term of one year after the record of the "transfer thereof on the books of the corporation, and

“ for the term of six months after judgment recovered
“ against such corporation, in any suit commenced within
“ the year aforesaid; provided, that in every such case,
“ the officer, holding the execution, shall first ascertain
“ and certify upon such execution, that he cannot find
“ corporate property or estate.

“ Sect. 19. In such case, the officer may cause the
“ property of such stockholder to be levied upon by exe-
“ cution, in the same manner as if the same were against
“ him, individually, after giving him forty-eight hours'
“ previous notice of his intention, and the amount of the
“ debt or deficiency, if he reside within the state, or, if
“ not within the state, to his agent, if he have any with-
“ in the state, otherwise to the clerk of the corporation;
“ unless such stockholder, his agent, or the said clerk, on
“ demand and notice as aforesaid, shall disclose and show
“ to the execution creditor, or the said officer, attachable
“ corporate property or estate, sufficient to satisfy said
“ execution and all fees.

“ Sect. 20. Such creditor, after demand and notice,
“ as mentioned in the preceding section, at his election,
“ may have an action on the case against any such stock-

"holder to recover of him, individually, the amount of "his execution and costs, or of the deficiency, as afore- "said, not exceeding the amount of the stock held by "such stockholder."

At the same time the legislature of Maine enacted the 23d section of chapter 76, of the revised statutes of that state, which is as follows:

"Sect. 23. All acts of incorporation, passed after the "seventeenth day of March, in the year eighteen hund- "red and thirty-one, or which may hereafter be passed, "shall, at all times, be liable to be amended, altered, or "repealed, at the pleasure of the legislature, in the same "manner, as if an express provision to that effect were "therein contained; unless there shall have been inserted "in such act of incorporation, an *express* limitation or "provision to the contrary; but nothing in this section "shall be construed as superseding or abrogating any "control, which, by the principles of the common law, is "vested in any of the judicial courts, over any corpora- "tion or any of its officers, in cases of misconduct, negli-

" gence, irregularity of procedure, or other cause, which, " on such principles, would require the interference of " such court."

When these provisions of the revised statutes of Maine, of 1841, took effect, the act of incorporation of the Kennebec and Portland Railroad Company had not been accepted by the corporators. It was not a contract between parties, but was simply a statute of the state, affected, like all other mere statutes, by later legislation. It was affected by these provisions, and when accepted, it was accepted, subject to them. The liability of future stockholders was determined by them, and the subjection of the act of incorporation, at all times, to the pleasure of the legislature, was declared.

When the defendant became a stockholder of this corporation, the "*charter*" of the corporation contained no "*assurance*," — nor any semblance of one, — that "he would be responsible to the extent of twenty-five hundred dollars, for any debt or debts of the corporation."

"The defendant, by becoming a stockholder, assented to" *no* "such assurance."

"The plaintiff, by giving credit to a corporation," solvent or insolvent, embarrassed or unembarrassed, "trusted to" *no such* "assurance," and no contract whatever "arose between the plaintiff and the defendant."

The corporators, by accepting the act of incorporation in 1846, assented to the liabilities of their stockholders, as imposed by the laws of the state, in force at that time, and as they might be modified by the legislature afterwards.

The defendant, by becoming a stockholder, assented to his subjection to *statute* liabilities only.

The plaintiff, in selling his sleepers to the corporation, made a contract with the corporation alone, and trusted to the laws of the state for a remedy to enforce this contract, in case of a breach by the corporation, and to such statute liabilities of stockholders in addition, as the action of the legislature might create.

Any such "remedy against the stockholders would not arise from any contract with them, but would be given only by positive statute."

"There is no privity of contract between the creditors of the corporation and the individual members. They are, therefore, not personally liable, unless this liability is expressly imposed by statute."

"Such liability," says C. J. Shaw in the case of *Gray* v. *Coffin*, 9 Cushing's Reports, 192, "is a wide departure from the established rules of law, and is, therefore to be construed strictly, and is not to be extended beyond the limits to which it is carried by positive provisions of statute."

Coffin v. *Rich*, 45 Maine R., 511.

When the act incorporating the Kennebec and Portland Railroad Company had been accepted, and until March 16th, 1855, the liability of its stockholders for the debts of the corporation, was fixed by the 18th section of chapter 76, of the revised statutes of 1841; and one mode of enforcing this liability was by an action on the case, as provided by the 20th section of the same chapter.

On March 16th, 1855, the legislature of Maine passed "an act to amend the seventy-sixth chapter of the revised statutes," the first section of which act is as follows:

"Sect. 1. The words 'to be taken on execution,' in "the sixth line of the eighteenth section of the seventy-"sixth chapter of the revised statutes, and the nine-"teenth and twentieth sections of said chapter are here-"by repealed, and the following section is substituted in "place thereof; namely,

"Sect. 19. After such execution shall have been re-"turned unsatisfied as aforesaid, the judgment creditor "may have an action of *scire facias*, with the usual pro-"vision for attachment of property, against any one or "more stockholders of such corporation, to show cause "why judgment should not be recovered against them, "for the amount due on his execution, to the extent of "their individual liability aforesaid; and in the execution "issued upon any such judgment in *scire facias*, the pro-"portion to be paid by each of said stockholders, shall "be specifically designated. And in such action of *scire* "*facias*, any defendant may prove in reduction of his said "liability, the amount of debt of the corporation he has

" previously paid, re-payment of which has not been made " or secured to him, and may show any other legal cause " why judgment should not be rendered against him; " *provided*, that this act shall not apply to any suits or " actions now pending."

In August and October, 1855, after the passage of this last act, the plaintiff sold his sleepers to the Kennebec and Portland Railroad Company.

The 18th section of chapter 76, of the revised statutes of 1841, made the property of the stockholders of the corporation liable for the debt of the corporation arising from these sales of sleepers, and the action of *scire facias*, as provided by the act of March 16th, 1855, was then the only mode of enforcing this liability.

The act of April 9th, 1856, repealed the law creating this liability, and the law which provided the remedy for enforcing it, and so might have destroyed both, if that act was valid, and effective upon the plaintiff's claim.

The plaintiff's counsel may argue, as he has already intimated in the second position of his opening argument, That, even if the plaintiff's remedy against the individual stockholders was given by the statutes, to which reference has been made, and not by the charter of the corporation, then the act of April 9, 1856, "so changed the nature and extent of existing remedies, as materially to impair the rights of the plaintiff as creditor of the corporation, and thus impaired the obligation of his contract with the corporation"—and for this reason is invalid, and inoperative as to him.

If this proposition were correct, which is denied, the plaintiff is not in a position to receive any advantage from it; because,

If the act of April 9, 1856, should be treated as null for *any* purpose, the rights of these parties would have to be determined as if this act never had any existence. It would have to be ignored. The plaintiff would then be in the same position as when he sold the sleepers in 1855, with a conditional claim against the property of certain stockholders of the railroad corporation, which he could enforce by an *action of scire facias only*—unless his remedy had been changed by some later law. The 18th section of chapter 76, of the revised statutes, and the act of March 16, 1855, as to the plaintiff, would be unrepealed.

The *remedy* provided by the act of 1856, could not be held valid, so as to aid him, while the residue of the act was treated as null — because that remedy is expressly limited to liabilities created by the same act. There is no thread to connect it with the liability imposed by the 18th section of chapter 76, of the revised statutes of 1841.

The plaintiff commenced his action against the defendant, March 26, 1858,—record, page 7. At that time, the revised statutes of Maine of 1857 had become law, and contained the entire body of the general statutes of the state, except a few enumerated acts.

By the general repealing act of 1857, found in the revised statutes of that year, page 751, all the revised statutes of 1841 were repealed, including the 76th chapter. The act of March 16th, 1855, was repealed again expressly, and the act of April 9, 1856.

The 2d section of this repealing act, page 752, provided, that

"The acts declared to be repealed, remain in force, * * "for the preservation of all rights and *their remedies exist-*"*ing by virtue of them.*"

The act of March 16th, 1855, was one of these "acts declared to be repealed."

If the act of April 9th, 1856, should be regarded as a nullity, so far as it assumed to affect the plaintiff's rights, and remedy against the property of the individual stockholders of the Kennebec and Portland Railroad Company — then it clearly follows, that his only remedy to enforce his claims against these stockholders, was an action of *scire facias* against any one or more of such stockholders, pursuant to the provisions of the act of March 16th, 1855.

The law gave him no remedy in an action on the case, or an action of assumpsit, but only an action of *scire facias* to show cause why judgment should not be recovered against the defendant stockholders for the amount due on the plaintiff's execution, to the extent of their individual liability.

The law limited the time in which the plaintiff could bring his action. Both the statutes of 1836 and 1841 contained this limitation — of one year after the record of the transfer of the stockholders' shares, and six months after judgment recovered against the corporation, in an action brought within said year.

Unless the plaintiff's action was commenced within the time of this limitation, his remedy against the stockholders was lost, and the act of April 9, 1856, had no effect upon his claim — but his own laches destroyed it.

The present plaintiff has never brought his *scire facias*, the only remedy which the law gave, to enforce his alleged claim against the defendant. The limitation to his remedy expired long before the judgment in his present action was rendered in the court of Maine — and consequently, he has never been, nor can he ever be, in a position to contest before this court, the validity of the law of Maine, which he asks the court in his writ of error to pronounce invalid — for at the time, of the rendition of judgment in the court of Maine, it did not affect his remedy, which he had already lost by his own fault.

This reasoning will be equally effectual against the plaintiff's attempt to procure a reversal of the judgment of the supreme court of Maine, even if it should be conceded that his claim against the defendant was secured to him by the charter of the Kennebec and Portland Railroad Company.

Nothing is clearer, than that the mere substitution by a state legislature of one remedy for another, cannot impair the obligation of a contract.

The Maine legislature substituted *scire facias* for case, and made it the only remedy for the plaintiff to enforce the liability of the defendant to him — whether that liability was created by the charter of the corporation, or the act of February 16, 1836, or the revised statutes of 1841.

The plaintiff neglected to prosecute this remedy within the time limited.

It is believed, that what has been said compels the following deductions:

1. The act of April 9, 1856, is *presumed* to be valid.
2. It is valid upon its face.
3. If invalid at all, it is because of its effect upon the plaintiff's alleged claim against the defendant.
4. The action of assumpsit, brought by the plaintiff against the defendant, was unauthorized — and the plain-

tiff cannot, in such action, contest the validity of said act, upon the ground of its repugnancy to the Constitution of the United States.

5. Any liability of the defendant or his property for the debts of the Kennebec and Portland Railroad Company, was not imposed by the *charter* of that corporation, but by the 18th section of chapter 76, of the revised statutes of Maine, of 1841.

6. That charter was accepted, subject to the revised statutes of 1841, which fixed the liabilities of stockholders, — and also authorized the legislature of Maine, to alter, amend, or repeal this charter at its pleasure; and the act of April 9, 1856, was rightfully enacted by virtue of this authority.

7. The act of April 9, 1856, did not take away any rights of the plaintiff under the charter of the Kennebec and Portland Railroad Company, nor assume to — but it might have taken away rights of the plaintiff, existing before, by virtue of the 18th section of chapter 76, of the revised statutes of 1841, and the act of March 16, 1855, if he had not previously lost these rights by not properly prosecuting them.

8. Even if the act of April 9, 1856, was invalid, the plaintiff has no right to deny its validity, because he has failed within the time limited therefor, to prosecute the only remedy authorized by law to enforce his rights; to wit, an action of *scire facias* — and it is immaterial whether his rights were created by the charter of the corporation, or by the statute. Having by his own laches lost his legal remedy, the act in question does not impair his rights or his remedy — and therefore is not invalid as to him.

We proceed to examine the two propositions, which the plaintiff's counsel labors to establish by his opening argument, and the authorities upon which he relies.

His first proposition is,

"That the law in question;" i. e. the act of April 9, 1856, "impaired the obligation of *a contract between the plaintiff and the defendant.*"

This position has already been substantially anticipated, and, it is believed, refuted.

The counsel for the plaintiff bases this proposition upon the assumption, that the *charter* of the Railroad Company created a liability in stockholders for the debts of the company.

This has been shown to be an erroneous assumption. But if it were correct, it has also been shown, that the act of April 9, 1856, did not affect, nor assume to affect the *charter* of the corporation.

The *pro forma* ruling to the contrary, of a judge presiding at *nisi prius*, for the purpose of aiding in the transfer of an action to this court from a state court, surely cannot control the authority of unambiguous statutes, and reported judicial decisions.

It does not appear from the record, what portions of the instructions of the presiding judge to the jury, were sustained by "the supreme court of Maine, at its general term, sitting as a court of law, and being the highest court of that State." It only appears, that the exceptions filed by the plaintiff were overruled. A part of the instructions to the jury were given at the request of the plaintiff, and were entirely favorable to him — as, that the *charter* of the Kennebec and Portland Railroad Company imposed a responsibility upon the stockholders, for the debts of the company — and that, but for the act of April 9, 1856, the plaintiff would clearly be entitled to recover in this action.

If these instructions *were erroneous,* the court would not have set aside the verdict for that reason, because being favorable to the plaintiff, and having been given at his request, he would not have been aggrieved thereby.

Revised statutes of Maine, of 1857, chap. 77, § 27. *Rice* v. *Wallace,* 30 Me. R., 242. *Dunn* v. *Moody,* 41 Me. R., 239. *Robinson* v. *White,* 42 Me. R., 209.

The only instructions, material to this discussion, which, the record authorizes us to find, were sustained by the law court of Maine, are those which were unfavorable to the plaintiff; to wit,

That there was no contract between the plaintiff and the defendant — and that the act of April 9, 1856, had wholly taken away and destroyed all right of the plaintiff to recover anything of the defendant; and that said act was constitutional and valid, and not inoperative or void.

So that, even the record in the case at bar alone, irrespective of the various statutes of Maine which have been cited, does not show, that the highest court of the state has held, that the *charter* of the Kennebec and Portland Railroad Company created any liability on the part of the stockholders for the debts of the company — or that the act in question had destroyed or impaired any rights of the plaintiff under such *charter* — while these statutes demonstrate the negative of both these propositions.

But, if it should be conceded, for the time, that the act of February 16, 1836, and the act to incorporate the Kennebec and Portland Railroad Company, of April 1, 1836, had never been repealed in any part of either — nor changed, nor modified — and had remained in full force, from the days of their enactment till now — then, no contract would have arisen between the plaintiff and defendant out of the provisions of these statutes, and the acts of these parties.

In such case, any liability for the debts of the corporation, besides that of the corporation itself, would be created by virtue of the 3d and 4th sections of the act of February 16, 1836.

The 3d section declares that, " the *shares* of individual " stockholders, shall be liable for the *debts of the cor-* " *poration.*"

" And in case of *deficiency of attachable corporate prop-* " *erty or estate*, the *individual property, rights, and credits* of " any stockholder shall be liable to the *amount of his stock*, " for all *debts of the corporation* contracted prior to the " transfer thereof, for the term of one year after the rec- " ord of the transfer in the books of the corporation, and "for the term of six months after judgment recovered "against said corporation, in any suit commenced within "the year aforesaid, and the same may be taken in *execution on said judgment*, in the same manner as if said judgment and execution were against him individually, or, "said creditor, after said judgment, may have his *action "on the case* against said individual stockholder; but, in "no case, shall the *property rights* and *credits* of said stockholder be taken in execution, or attached as aforesaid, "beyond the *amount of his said stock*."

The next section provides, that, if sufficient corporate property to satisfy the execution cannot be found, the officer having the execution shall certify the deficiency on the execution, and give forty-eight hours' previous notice thereof to the stockholder, whose *property he is about to take*—and if such stockholder, within this time shall show to the creditor or officer, sufficient attachable *corporate* property, to satisfy the debt, "his *individual property, rights, and credits shall thereupon be exempt* from attachment and execution."

These provisions recognize the corporation as a person, an entity—capable of contracting debts—and these are *its* debts, and not the debts of any other party.

No other *person* is made liable for these debts—no other thing is made liable for them—originally, or absolutely, or wholly, or permanently.

"The" *shares* "of individual stockholders shall be liable for the *debts of the corporation*." And these *shares* shall not be liable, originally, nor absolutely.

Only in *case of deficiency* of attachable corporate property, the *individual property, rights, and credits* of any stockholder shall be liable, to the *amount of his stock*. An equal amount of the stockholder's property shall respond to the liability of his "*shares*."

This property might be taken on the execution, which had been issued on the judgment against the corporation, to which the stockholder was *no* party—or the creditor might have his action on the case, on the statute; manifestly, to reach, by the process of foreign attachment, the "rights and credits," which could not be reached by the execution against the corporation.

But in no case, could property, rights, and credits of a stockholder be taken in execution or attached, beyond the amount of his stock. And the stockholder could exempt his property entirely from the execution and attachment, by disclosing and showing sufficient attachable corporate property.

In all this, there is no recognition of any contract liability, on the part of the stockholder. The remedy, to enforce whatever liability the statute creates, *excludes* the theory of any contract. It is purely a statute remedy, to enforce a statute burden against the *property* of the stockholder.

Whatever fanciful theories may be based upon this liability now, it is clear that in the legal intent of the statute, no promise of the stockholder to any future creditor of the corporation could be implied from his becoming such. If this intent had been otherwise, an action of assumpsit would have been the remedy, and not a special action on the case, or an execution, to which the stockholder was no party, running immediately against his property.

The provisions of this act seem to have been studiously constructed, as if with the very design of excluding even the semblance of a *promise* by the stockholders, as the basis of the liability created by the act, or of the creditor's remedy.

His property is expressly declared liable, instead of himself,—and that, only to the amount of his shares—and this liability is conditional, upon the deficiency of attachable corporate property—is enforced by an execution to which he is an absolute stranger, in a most summary way—and is extinguished by the mere substitution of corporate property.

There was no privity, "no connection or bond of union (ligamen) existing between the plaintiff and defendant in relation to" the sales of wood to the corporation. There was no contract between them, but a *legal* liability of *property* on one side, and a *legal* right on the other.

By becoming a stockholder, the defendant acquiesced in any liability which the legislature might create and impose upon him, or his stock, or his property, but he gave no such assent as would be equivalent to a letter of credit over his own voluntary signature. It might as well be contended that, every member of community, in acquiescing in the burdens, and liabilities, and penalties

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which the law lays upon him, makes so many binding promises, and issues so many letters of credit, upon which actions of assumpsit will lie, at the instance of any party who can establish an interest therein.

That no contract arose between the parties, and that the liability was purely a statute liability, was directly decided in *Coffin* v. *Rich*, 45 Maine R., 307, before cited.

It is respectfully submitted, that the decisions of this court, and the courts of New York, cited by the plaintiff's counsel, do not support his first proposition.

The decisions in *Woodruff* v. *Trapnall*, 10 Howard, 190, and in *Curran* v. *Arkansas*, 15 Howard, 304, were based upon the peculiar facts upon which those cases arose.

In *Paup et. al.* v. *Drew*, 10 Howard, 218, the court say of the decision in *Woodruff* v. *Trapnall*,

" This court held that the 28th section in the charter constituted a contract between the state and the holder of the bills of the bank. That the pledge of the state to receive the notes of the bank, in payment of debts, was a standing guarantee, which embraced all the paper issued by the bank until the guarantee was repealed. *And that* *this construction was founded upon the fact, that the bank belonged exclusively to the state, was conducted by its officers, and for its benefit.* That in this respect, the obligation of the contract applied to a state equally as to an individual And that as to the binding force of a similar guarantee by an individual, there would seem to be no ground for doubt."

The state legislature had chartered a banking corporation of which the state was the sole owner; and in the charter had declared that the bills of this bank, which was nothing but an agent of the state itself, should be received in payment of debts due to the state. The bank, by its charter, was simply a convenient agent of the state to negotiate between the state and third parties —and its bills were substantially bills of the state of Arkansas, the same in effect, as those now issued by the United States Treasury Department, upon their face, and in terms, made receivable in payment of debts due to the state.

To make the case at bar analogous to this, the stockholders of the Kennebec and Portland Railroad Company should be the supreme power which chartered the Company — so that the *charter*, instead of being a contract between the state and the stockholders, should be a contract between the stockholders who created it, and the community who accepted and acted upon its guarantees, voluntarily inserted in it by these stockholders.

The state of Arkansas *promised* to receive the bills of their bank — expressly, by its charter, made by the state. The stockholders of this railroad company simply submitted to "*liabilities* and *duties*" to which the legislature compelled them to be "*subject*."

The decision in *Curran* v. *Arkansas* was upon the construction of the same bank charter, and is no more pertinent to the case at bar than that in *Woodruff* v. *Trapnall*.

It is believed, that the New York decisions furnish still less support to the first position of the plaintiff's counsel.

The long passage extracted from the opinion of the court of appeals, in *Corning* v. *Mc Cullough*, 1 Comstock 47, in its reasoning, does indeed, *prima facia*, sustain this position. And if, as the counsel affirms, this reasoning were predicated upon "such an act of incorporation" as that which incorporated the Kennebec and Portland Railroad Company, it might be an authority of some value to the plaintiff.

But the act of incorporation of the Rossie Galena Company, considered by the court of appeals of New York, in the case reported in Comstock, was wholly unlike that which, for the present, it is conceded, the act incorporating the Kennebec and Portland Railroad was.

The act incorporating the Rossie Galena Company, provided,

"That the *stockholders* of the corporation shall be, *jointly and severally, personally* liable for the *payment of all debts and demands* contracted by the corporation."

By their charter, these stockholders were liable for the payment of *all* debts and demands—not *of* the corporation—but contracted by the corporation. They were the stockholders' debts, as well as the debts of the corporation—contracted by the corporation—as if *it* were the agent of the stockholders.

The stockholders were liable—not the "property rights and credits" of the stockholders, nor their '*shares*'—but the men themselves. They were liable for the *payment of all debts and demands*—not to the amount of their

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stock or shares which they severally owned, only. They were liable in the first instance, at the very creation of the debt or demand — not only in case of deficiency of corporate property. They were liable permanently — as long as the debt remained a debt — not for a year only after the transfer of their stock, or six months after judgment recovered against the corporation, on a suit brought within such year — but *forever*, if the debt was kept alive — without any power of exonerating themselves by showing corporate property.

Thus, totally unlike the stockholders in the Kennebec and Portland Railroad Company, these New York stockholders were themselves liable — originally, personally, jointly and severally, absolutely, unqualifiedly, totally, permanently, with no power of exemption.

Their property, as if that were the only thing liable, could not be taken upon an execution issued upon a judgment recovered against the corporation alone — nor were they subject to the appropriate suit for enforcing a legal liability, not arising from a breach of contract, an action on the case — but the common law supplied the remedy for the creditors, in the form of action suited to enforce their liability as defined by the charter.

There was no statute remedy, to contribute its aid in determining what, in the intent of the charter, the nature of their liability was. By this charter, the stockholders were made liable in the same way and to the same extent, as if they had not been incorporated, but were simply members of a joint unincorporated company, which had adopted a specific name.

And the court held, for this reason, that they were a company, with only a qualified corporate capacity — and that the intention of the Legislature obviously was, *thus* to incorporate them.

The court further held, that the New York act of incorporation did not relieve the stockholders from their common law liabilities, as members of a voluntary association, but left these liabilities unimpaired — and that consequently, their liability was an original one, as general partners, not created by the charter, but arising at common law — and that the rights of creditors, were not given or created by any statute, but were common law rights, to be enforced by the common law remedies.

By the first section of the act to incorporate the Kennebec and Portland Railroad Company—record p. 9—the persons named, their associates, successors, and assigns, "be, and they hereby are, made a body politic and corporate, by the name of the Kennebec and Portland "Railroad Company, and, by that name shall have and "enjoy *all* the *rights*, *privileges*, and *immunities* incident to "corporations."

Here are no *qualified* corporate capacities — no withholding of corporate immunities, which left the stockholders subject to their individual liabilities at common law, as general partners — and the liabilities and duties to which they are made subject, are expressly declared to be those provided by a statute.

When *Conant* v. *Van Schaick*, 24 Barb, 87, was decided in the supreme court of New York, a general statute of New York, made certain corporations, qualified corporations, just like the Rossie Galena Company — by language precisely identical with that in the charter of that Company; and the liability of stockholders of one of these corporations, on the authority of *Corning* v. *Mc Culleugh*, was held to rest on a contract — at common law— and *therefore*, a law repealing such liability was held to impair the obligation of contracts.

But if any contract did arise between the plaintiff and defendant, out of the provisions of the Kennebec and Portland Railroad charter, and the acts of the parties — the act of April 9, 1856, did not impair its obligation, because—

As we have before shown, that act had no operation upon any legislation of the year 1836.

But it is time to withdraw the concession which has been made — and to reassert, that the only claim which the plaintiff had upon the stockholders of the Kennebec and Portland Railroad Company, or their property, was given by the revised statutes of 1841, ch. 76, § 18 — and his only remedy to enforce his claim was the action of *scire facias*, pursuant to the act of March 16, 1855.

A fortiori, no contract between the plaintiff and defendant, arose out of the provisions of the latter statutes, and the acts of the parties.

If any such contract did arise, the law of April 9, 1856, did not impair it — but by the laches of the plaintiff, in not prosecuting his statute remedy, within the time limited, he lost his rights under it.

II. The second proposition, of the plaintiff's opening argument asserts that,

"The law in question (the act of April 9, 1856) did impair the obligation of the contract of the plaintiff with the Kennebec and Portland Railroad Company."

The reasoning of the counsel is as follows:

"When the debts were contracted, the plaintiff had two remedies; one against the corporation, the other against the stockholders. The former was, and was known to be wholly useless; the latter was sufficient and effectual. And the law in question has destroyed this sole efficient and effectual remedy, and substituted no other in its place. Such a law impairs the obligation of the contract, to enforce which the remedies are given."

Under this branch of his argument, the counsel reiterates the idea that "the *charter* of the corporation conferred upon the plaintiff the right to levy his execution on the property of the stockholders, or to subject their property to the payment of his debt by an action on the case." He asserts, that, "this law of the state—the charter—had created this right, and attached it to the contract," and that "it was a part of its obligation."

It is proper to repeat here a few things, which have already been repeated more than once.

1. The *charter* of the corporation did not confer upon the plaintiff, any right to proceed against the stockholders or their property — by a levy, or by an action on the case. But the 18th section of chapter 76, of the revised statutes of 1841, created the liability of the stockholders' property — and the act of March 16, 1855, conferred upon the plaintiff the right to enforce this liability by an action of *scire facias* only. The right to take stockholders' property on the creditor's execution against the corporation, had been repealed, before the plaintiff sold his sleepers to the corporation.

2. The act of April 9, 1856, did not affect any rights — nor assume to — conferred by the charter — and there-

fore, it impaired no obligation, which the *charter* had "attached" to the plaintiff's contract with the corporation.

3. That act has never taken away any rights of the plaintiff, however conferred—since the plaintiff has never claimed them in the mode which the law provided—and if lost to him, they have been lost by his own fault.

But apart from these considerations, the second proposition of the plaintiff's counsel, suggests this one important question:

Could the act of April 9, 1856, simply by its repeal of a statute, which gave the plaintiff only a statutory right to take out of the defendant's property payment of his claim against the corporation, in addition to all the legal remedies against the corporation itself, impair the obligation of the contract between the plaintiff and the corporation?

It is believed, that the decisions of this court, relied upon by the plaintiff's counsel, fully authorize a negative answer to this inquiry.

"When the debts were contracted, the plaintiff had two remedies; one against the corporation"—the party with whom he contracted, the other against the stockholders, strangers to that contract.

In the opinion in *McCracken* v. *Hayward,* 2 Howard, 612, the court say,

"The *obligation* of a contract consists in its binding force on the *party who makes it.* This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the *law* defines the *duty* and the right, *compels one party* to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force."

And in another part of the opinion — "The obligation of the contract between the parties in this case, was to perform the promises and undertakings contained therein; the right of the plaintiff was to damages for the breach thereof, to bring suit and obtain judgment, to take out and prosecute an execution against the defendant till the judgment was satisfied, pursuant to the existing laws of Illinois. These laws, giving these rights, were as perfectly binding on the defendant, and as *much a part of the contract,* as if they had been set forth in its stipulations, in the very words of the law relating to judgments and execution."

"No agreement or contract can create more binding obligations than those fastened by the law, which the law creates and attaches to contracts."

The plaintiff's counsel quotes from the opinion of the court in *Curran* v. *State of Arkansas.*

"The obligation of a contract in the sense in which these words are used in the Constitution, is that *duty of performing it,* which is recognized and enforced by the laws."

It is difficult to conceive of language, which could more clearly define the obligation of a contract, than is found in the foregoing extracts—or of a definition more consonant with right reason.

"This obligation consists in its binding force on the *party who makes it"*—not on a third person upon whom a statute liability may rest.

"The obligation of a contract is that *duty of performing* it which is enforced by the laws."

Upon the contracting parties alone, rests the duty of *performing* a contract, and upon no person or thing besides. And the remedy that the laws provide for enforcing this duty, can be against the party alone who is bound by the duty — upon whom it rests. It is only when *that* remedy is seriously enervated, that the obligation of the contract is impaired. "The remedy for breach of contract is, by the general rule of our law, confined to the contracting parties."—Per *Coleridge J., Lumley* v. *Gye*, 2 Ellis & Blackburn, 246.

In the case at bar, the law gave the plaintiff two remedies—one against the corporation, the contracting party, to enforce upon it the obligation of its contract—to compel it to the duty of performing it. This remedy has never been changed—but exists to-day in the same form, and with all the vigor it had, when the debt of the corporation was contracted.

The other remedy, *in addition* to that which the law gave, to compel the performance of the contract by the party who made it, was created by statute, and assumed to subject the property of a stranger to the burden of paying the amount of the debt due to the creditor. But it did not assume to enforce the obligation of the contract, or to compel *its* performance.

And when a creditor succeeded in securing the amount of his debt by this remedy, the obligation of the contract was not discharged—the breach still remained, and the obligation remained as binding as ever.

This remedy never could enforce the obligation of a contract by the only person upon whom that obligation was laid, nor could its withdrawal impair that obligation.

By the same statute which subjected the property of stockholders to this liability, a remedy was given to the stockholders to recover the damages which they may have sustained from the neglect of the corporation to discharge the obligation of its contracts—showing that, although the creditor of the corporation may have collected the amount of his debt, so as no longer to have any rights under his contract, the other party to such contract had failed to perform the thing contracted for, and was still bound by its obligation.

"The plaintiff had two remedies — the one against the corporation—the other against the stockholders."

This is true — but the plaintiff, likewise, had two *rights* — and these two rights had two diverse origins and bases. The one was a right flowing from his contract with the corporation — a contract right. The other was conferred exclusively by the statute — and was exclusively a statute right. The one originated in the contract between the parties — the other originated in the "be it enacted" of the legislature of the state.

His two remedies were as diverse in their applications and objects, as his two rights were, in their sources and foundations. The remedies and the rights were correlated.

The remedy against the corporation was to enforce the obligation of the contract. The remedy against the stockholders was to enforce their liability, which no contract created, but which a statute did impose.

The remedy against the corporation could not enforce the liability of the stockholders, so as to make it available to the creditor — nor could the remedy against the stockholders enforce the obligation of the corporation to perform its contract.

The legislature might take away and destroy all legal process for compelling the corporation to perform its contract, and still leave the liability of the stockholder's property, and the creditor's statute right against that, unimpaired. So it might take away and destroy all power to enforce any rights against the stockholders, or their property, and leave the obligation of the contract unimpaired.

The insolvency of either the one party or the other, makes no difference in the answer to the question, whether the action of the legislature has impaired the obligation of the contract.

The obligation of the maker of a promissory note is different from that of the indorser or guarantor of the same note. But the holder has two remedies — one against the maker — the other against the indorser or guarantor. A law which should take away the remedy against the indorser or guarantor, would not impair the obligation of the maker's contract expressed in the note—

but it would impair the obligation of the contract with the indorser or guarantor. If, now, the liability of the indorser or guarantor, instead of arising from a contract, were arbitrarily imposed by a statute, which declared, that whenever a promissory note was made for a good consideration, certain relatives of the maker, or neighbors, or religious, or literary, or political, or business associates of his, should be liable, as guarantors or indorsers of such note, who would be bold enough to contend, that the repeal of such statutory liability, would impair the obligation of the contract between the maker and the payee of such note?

It would add no strength to an argument in support of such a proposition, to say, that when the payee of the note parted with the consideration for it, he trusted to this liability which the statute imposed — or that the maker was insolvent, and the remedy against him was insufficient and useless, and that the repeal of the statute liability of the other persons, had taken away and destroyed the only sufficient remedy which the payee had.

By the laws of Maine, a town, which has incurred expense for the support of a pauper, may recover it of him, his executors, or administrators, in an action of assumpsit, on an implied contract. The value of this remedy will depend upon the contingency of the pauper's having property at any time.

In addition to this remedy against the pauper, who has received the support, the statute makes certain kindred of the pauper liable—and provides, that the town which has incurred expense for the relief of a pauper, may have a remedy against such kindred, by complaint to the Supreme Court. Upon a hearing on such complaint, the court may assess and apportion upon such kindred, as are found to be of sufficient ability, a reasonable sum, for the support of such paupers, to the time of such assessment—and may enforce payment thereof by warrant of distress. Such assessment is not to be made to pay any expense for relief afforded more than six months before the complaint was filed.

Thus, the town furnishing relief to a pauper, has two remedies—one against the pauper, to enforce the obligation of his contract. This, against a *pauper*, is valueless.

The other remedy is against the kindred, to enforce the legal rights of the town against them. This is effectual and sufficient. The town relies upon it when the relief is furnished. But no one can seriously contend, that this latter remedy can have any power to enforce the obligation of the pauper's contract with the town, or that its abrogation can impair such obligation.

Even if it should be admitted, that the town, which had furnished the relief, had a vested right to the remedy, against the kindred of the pauper, a statute which destroyed this right would not be repugnant to the Constitution of the United States. *Watson* v. *Mercer*, 8 Peters, 110.

So in the case at bar, if the law in question merely impaired vested rights of the plaintiff, it is not, therefore, in conflict with the Constitution of the United States.

In one of the extracts quoted from *McCracken* v. *Hayward*, the court say:

"These laws, giving these rights, were as perfectly binding on the defendant, and as *much a part of the contract*, as if they had been set forth in its stipulations, in

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the very words of the law relating to judgment and execution."

This is an apt rule to apply to the case at bar.

What effect upon the contract between the plaintiff and the corporation, would have been produced, had the corporation set forth in writing, in the stipulations of the contract, the very words of the law creating the remedy against the stockholder's property? Such words would have only encumbered the written instrument, without affecting at all the obligations or the rights of either party to the contract.

The distinction between a contract right and a statute right — a contract liability and a statute liability, is clear and decided, and cannot be overlooked or ignored in the case at bar.

One more suggestion will close this argument.

When the charter of the Kennebec and Portland Railroad Company was accepted, October 28, 1846, it was accepted, subject to the 23d section of chapter 76, of the revised statutes of 1841. This section declared, that,—

"All acts of incorporation, passed after the seventeenth day of March, in the year eighteen hundred and thirty-one, * * * * * shall, at all times, be liable to be amended, altered, or repealed, at the pleasure of the legislature, in the same manner as if an express provision to that effect were therein contained."

When the contract between the plaintiff and the corporation was made, this control of the legislature over the charter of the corporation existed, as if an express provision to that effect were contained in the charter itself. Any rights or remedies conferred by the charter, were subject to such provision, and dependent upon the pleasure of the legislature. The liabilities of stockholder's property were thus conditional only — subject to the proviso that the legislature did not remove them.

When the plaintiff and the corporation contracted, this proviso was as *perfectly binding on the plaintiff, and as much a part of the contract, as if it had been set forth in its stipulations, in the very words of the law relating to the control of the legislature over the charter.*

Ether Shepley of Counsel

T. M. Hayes facit.

Supreme Court of the United States.

GOING HATHORNE,

VS.

JOSIAH CALEFF.

REPLY OF THE COUNSEL EOR THE PLAINTIFF IN
ERROR TO THE ARGUMENT OF THE
DEFENDANT'S COUNSEL.

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SUPREME COURT OF THE UNITED STATES.

GOING HATHORNE,

vs.

JOSIAH CALEFF.

REPLY OF THE COUNSEL FOR THE PLAINTIFF IN ERROR TO THE ARGUMENT OF THE DEFENDANT'S COUNSEL.

The first point suggested by the defendant's counsel is, that the proceedings in the State Court were collusive; that the counsel for both parties and the Supreme Court of the State combined together "to aid the plaintiff in his enterprise of bringing the case before this Court."

The only reasons assigned for this extraordinary suggestion are, that the form of the action was misconceived, it being, as is said, assumpsit, when it ought to have been case; and that the presiding judge instructed the jury "that by the charter of the Kennebec & Portland Railroad Company, as held by the full law Court of this State, the stockholders therein were responsible for the debts of the company to the extent of their stock," and the counsel denies that the full law Court has held that this responsibility arose from *the charter*, but did decide that it arose from provisions of general statutes, and he refers to the case of Coffin *vs.* Rich, 45 Maine Rep. 507, to support his denial. This case was an action by a judgment creditor of this same corporation to enforce the individual liability of a stockholder. The *charter* of the corporation contained the provision that it was to be "subject to the liabilities and duties provided for by an act concerning corporations, passed February sixteenth, one thousand eight hundred and thirty-six." The defendant's counsel in that case argued that the act of 1836, expressly referred to in the charter, had been repealed by the Revised Statutes of 1841, before this corporation was organized, and therefore the corporation was not subject to its provisions. To which the Court responded, "We are satisfied, notwithstanding the very ingenious argument of the counsel for the defendant, that the corporation was subject to its provisions." 45 Maine Rep. 508. If, then, *the charter* of the corporation *expressly* referred to that act as governing the liability of its stockholders, and the full law Court expressly declared that it did govern them, there does not seem to have been any want of *accuracy*, even in the judge telling the jury that the full law Court had held that by the *charter* the stockholders were liable.

As to the form of the action, the declaration states every fact necessary to the legal liability of the plaintiff; avers that by virtue thereof the defendant has become liable; and adds, that in consideration thereof he promised, etc.

It is believed that the only misapprehension respecting the form of the action, was not by the counsel who drew the declaration or who acted at the trial, or by the judge who presided, but by the counsel who has now argued for the defendant in error, when he assumes that an action on the case sounding in assumpsit was not an appropriate mode of declaring. The statute having created a legal obligation to pay money and given an action on the case to recover it, that action is to be formed in assumpsit, or tort, according to the character of the facts; and in such a case as this, where there is no element of tort or of active wrong, an action on the case in assumpsit is a suitable and usual mode of declaring (Chitty's pleadings 101, 102, 106). But no question respecting the form of the action is open upon this writ of error, which raises but a single question under the 26th section of the judiciary act of 1789.

The next point made by the defendant's counsel is, that the act of 1836, which is referred to in the charter as creating the liability of stockholders, was repealed by the Revised Statutes of 1841, *before this corporation was organized.*

The act of 1836 was specially referred to in the charter as creating the liabilities of stockholders. This act, *in common with all other statute laws,* was repealed by the Revised Statutes of 1841; but the Revised Statutes, ch. 76, sections 18, 19, 20, re-enacted substantially the same liability of the stockholders, and the same remedies of the creditors, as were created by the act of 1836, with no substantial change; *and this enactment took effect concurrently with the repeal,* so that there was not an instant of time after the enactment of the charter and before the organization of the corporation, when the liability of the corporators and the remedies of creditors provided for in the charter, did not exist by law; and the only change made was that the law of 1836, referred to *nominatim* in the charter, was replaced by the Revised Statutes after the charter was enacted, and before the corporation was organized. The observations of Shaw, C. J., on this subject, in Wright *vs.* Oakley (5 Met. 406), are both pertinent and weighty:

"In construing the revised statutes and the connected acts of amendment and repeal, it is necessary to observe great caution to avoid giving an effect to these acts which was never contemplated by the legislature. In terms, the whole body of the statute law was repealed; but these repeals went into operation simultaneously with the Revised Statutes, which were substituted for them, and were intended to replace them, with such modifications as were intended to be made by that revision. There was no moment in which the repealing act stood in force without being replaced by the corresponding provisions of the Revised Statutes. In practical operation and effect, therefore, they are rather to be considered as a continuance and modification of old laws, than as an abrogation of those old and the re-enactment of new ones."

The case then stands thus. The charter, *when enacted*, declared that the stockholders are to be liable for the debts of the corporation according to the provisions of the Act of 1836. Before the charter was accepted and the corporation organized, the Act of 1836 was repealed, and the liability provided for by the Revised Statutes was simultaneously substituted. *Before the charter was accepted*, it was *pro tanto* modified. When accepted, it was, as the defendant's counsel insists (p. 17), accepted, ed, subject to these provisions of the Revised Statutes, which had been thus substituted in place of the provisions of the Act of 1836; and its legal effect was precisely the same as if the charter had referred to the Revised Statutes by chapter and section, instead of the reference to the Act of 1836. So that there does not seem to be any inaccuracy in speaking of the liability as arising from the charter.

But, after all, the point raised by the defendant's counsel is only a dispute about terms. If the stockholders were liable for the debts of the corporation at the time when the debt due to the plaintiff was contracted, it is not material what was the date of the law which created that liability, or whether it was or was not specifically referred to in the charter, as was said by the Supreme Court of Maine in Coffin *vs.* Rich, 45 Maine R., 510.

" Though the Statute of 1836 was repealed by the Statute of 1841, a new statute was enacted, making members of corporations personally liable to the amount of their stock, for all debts contracted during their membership. The charter of the Kennebec & Portland Rail Road Company, though granted previously, *had not then been accepted;* and the company was not organized till several years afterwards. When the corporators became members of the corporation, they knew that the law held them responsible for the corporate debts.

Such was the law when the contract was made between the plaintiff and the corporation; the defendant was a stockholder at the time, *and if there had been no change in the statute since that time, there could be no doubt of the defendant's liability.*"

The next point made by the defendant's counsel may be thus stated:

That at the time the debt to the plaintiff was contracted, though the stockholders were liable for the debt, the remedy was by *scire facias,* as prescribed by the Act of March 16, 1855, a transcript of which is printed in the brief of defendant's counsel, page 20. That though this act was repealed by the Act of April 9, 1856, before this action was brought, yet if this Act of 1856 be held inoperative because in conflict with the Constitution, then it did not repeal the Act of 1855, and the plaintiff ought to have brought *scire facias,* which he has not done.

To this we answer:

1. There is no question before this court as to the form or appropriateness of the action. That is a question of State law, and the highest tribunal of the State has decided that but for the *destruction* of *the right* of the plaintiff, by the act of 1856, *this* action could have been maintained. (Record, page 21.)

2. The argument proceeds upon a false assumption. It assumes that, if the Act of 1856 was inoperative to impair the obligation of a contract with the plaintiff either because there was a contract by the stockholder, or because this act deprived the plaintiff of his remedy on the stockholders, this act was also inoperative to repeal a specific remedy by *scise facias.* But this is a *non sequitur.* The *form* of the remedy is under the control of the Legislature. It was competent for them to abolish that of a *scire facias,* given by the Act of 1855, provided some other effectual remedy be substituted by statute, *or exists in the common law.* Now the act of 1856 does substitute another suffi-

cient remedy by action on the case; it was operative to repeal the remedy by *scire facias*, though not to destroy the right of the plaintiff, or take away *all remedy* on the stockholders.

It is argued that the remedy given in the Act of 1856, by an action on the case, is not applicable, because it is limited to liabilities *created by that act.* But it is not so limited either in terms or by any necessary implication. Besides, when this action was brought, the Revised Statutes, 1857, ch. 44, sections 24, 25, 26, gave the same remedy. But if this were not so, still *by the Common Law of Maine* an action on the case is the appropriate form of action to enforce a legal liability created by statute, and therefore it is not needful to find any *statute* remedy in existence at the time this action was brought, and the Act of 1856 might operate to repeal the remedy by *scire facias* without substituting another, for one exists by the common law. It is further argued that though the remedy by *scire facias* under the Act of 1855, was wholly taken away by the repeal of that statute in 1856, yet before this action had been brought in 1858, there had been another revision of the statutes, and that the Act of 1855 was again repealed, but with a saving clause in common with all the other laws, "as to all rights and their remedies existing by virtue of them." How this is to operate to give vitality to the Act of 1855, which had been absolutely repealed by the Act of 1856, is not shown.

So that it is submitted that if the question as to the form of the action were now before this court, the proper conclusion would be that arrived at by the Supreme Court of Maine, that unless the act of 1856 took away the plaintiffs *right,* he is entitled to recover *in this action.* But as already suggested, it is conceived that no question arises on this writ of error, as to the form of the action, that being a question of local law, which must be passed on by the State Court, which also has the power to allow amendments of the pleadings when objections are taken to them, and they are found to be erroneous, or not adapted to the case. (See State *vs.* Folson, 20 Maine R. 209, where debt was charged to *scire facias*).

The only question before this court is whether, when the law of 1856, as construed by the State Court, destroyed the existing right of action by the plaintiff against the defendant to recover from him the amount of the debt due to him from the corporation, it impaired the obligation of a contract.

The Supreme Court of Maine held that it did not. The grounds of their decision do not appear by any reported opinion *in this case*, but they do appear by their reported opinion in Coffin *vs.* Rich, 45 Maine R., 507, which raised the same question.

Those grounds are (pp. 511, etc.), that the right of the plaintiff was *created by statute;* that the Legislature have power to take away by statute what was given by statute, except vested rights; and that the right of a party when it exists *only* by statute, does not become vested till after judgment.

It is respectfully submitted that this is erroneous doctrine when applied to this case.

1. The *right* of the plaintiff was not *created* by statute, and did not exist "only by statute." It is true there was a statute in existence which enacted that if the plaintiff should sell merchandise to a corporation which should fail to pay for it, he should have a right of action against any one of its stockholders to recover its price, to the amount of his stock. But this law did not *create* the plaintiff's *right.* It is wholly unlike the right to a penalty, which the court refer to. This plaintiff parted with his merchandise to an insolvent corporation *on the faith of this liability which the defendant, by taking stock, had assented to be subject to.* The only effect of the law was to apprise the parties that if such a sale should be made, the defendant would come under a legal obligation to the plaintiff to pay the debt, and to create that legal obligation upon the sale; just as the law apprises the vendee of goods, that he will come under

a legal obligation to the vendor for the price, and creates that legal obligation on the sale. The right in neither case is created by the law alone; but in both cases the law does create the legal obligation; and in one case just as entirely as in the other. It may be true that "a statute may take away what a statute has given, except vested rights." But the question still remains whether this plaintiff had not a vested right to the obligation of the defendant, and to some adequate remedy to enforce that obligation. In McCracken *vs.* Hayward the right of the plaintiff to sell the defendant's property on execution was given by a state law. Yet it could not be taken away or impaired by a state law. Because the creditor had a vested right to some adequate remedy such as existed when his contract was made. This plaintiff sold his property to an insolvent corporation on the faith of the obligation of the defendant to pay for it, and of the remedy the law then allowed him to enforce the obligation of the defendant to perform the contract.

If A is under a complete legal obligation to B to perform the contract of C, which B can enforce by an action against A; and which contract B made on the faith of A's obligation to perform it; has not B a vested right to have A perform the contract; and can A's obligation be released by law without impairing the obligation of a contract, within the meaning of the Constitution? It is A's duty to perform the contract. *That duty is recognized and enforced by the law.* The law is so changed that this duty can no longer be enforced. The obligation of the contract which A was under, is released. Is it any answer that C, an insolvent debtor, is yet under the obligation of the contract. The contract created two perfect, and complete, and several obligations — one of A, the other of C. One is as much the obligation of the contract as the other.

It is an unfounded assumption that the *obligation* of a contract can be incumbent only on *the party that makes the promise.*

The obligation of a contract is a duty of performing it recognized and enforced by the laws. An executor or administrator, though he has made no promise, is under a legal duty to perform the contracts of the deceased; *the obligation of the contract is incumbent on him;* and a state law releasing him would as clearly impair the obligation of the contracts of the deceased as a law releasing the living debtor. So a husband is bound to perform the contracts of his wife before marriage. Without making any promise, he takes on himself the legal duty of performing these contracts of hers, by voluntarily entering into the marital relation at a time when and place where the law made this duty incumbent on him. Could he be released without impairing the obligation of such contracts? For still stronger reasons was the obligation of this contract incumbent on the defendant.

He voluntarily entered into such relations with this corporation as created a perfect legal obligation to pay this debt when it was contracted, and the plaintiff parted with his property to an insolvent corporation on the faith of this legal obligation incumbent on the defendant.

It is respectfully submitted, that whether this obligation be viewed as the duty of performing an implied contract by the defendant, or as the duty of performing the express contract by the corporation, the release of the defendant impairs its obligation, within the meaning of the Constitution.

The defendant's counsel has pointed out a supposed distinction between the cases cited from the New York reports and this case. It is that in those cases the charters made the stockholders jointly and severally *liable* for all the debts and demands *contracted by the corporation. But the defendants were not contractors.* The contracts were made by a third person, viz, the corporation. The relation of the stockholders to the contracts *was not created by, the contracts themselves, but by the law,* as in this case; and the obligation of this defendant to perform this contract is as complete and perfect, and arises from the same causes as the obligations of the defendants in the cases in New York.

In those cases, as in this case, there was a liability created by law, and made incumbent on one person, to perform the contracts of another person.

If that liability could not be discharged without impairing the obligation of a contract, how can this liability be discharged without a similar violation of the Constitution?

B. R. CURTIS,
Of Counsel with the Plaintiff in Error.